CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 38 **JUNE 23, 2004** **NO. 26**

This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the Bureau of Customs and Border Protection, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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Bureau of Customs and Border Protection

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 4 2004)

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

SUMMARY: Presented herein are the copyrights, trademarks, and trade names recorded with U.S. Customs and Border Protection during the month of April 2004. The last notice was published in the CUSTOMS BULLETIN on May 5, 2004.

Corrections or updates may be sent to: Department of Homeland Security, U.S. Customs and Border Protection, Office of Regulations and Rulings, IPR Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: George Frederick McCray, Esq., Chief, Intellectual Property Rights Branch, (202) 572–8710.

Dated: June 4, 2004.

GEORGE FREDERICK MCCRAY, ESQ.,
Chief,
Intellectual Property Rights Branch.

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP0400047	20040402	20240402	MY SCENE BARBIE	MATTEL, INC.	N
COP0400048	20040402	20240402	HIBISCUS KEIKI LEI #82020	TRADE WEST, INC.	N
COP0400049	20040406	20240406	PRECIOUS FEET	HARITAGE HOUSE'76, INC.	N
COP0400050	20040407	20240407	YASMIN DOLL CONFIGURATION, ACCESSORIES AND PACKAGING	MGA ENTERTAINMENT INC.	N
COP0400051	20040407	20240407	JADE DOLL CONFIGURATION, ACCESSORIES AND PACKAGING	MGA ENTERTAINMENT INC.	N
COP0400052	20040407	20240407	SASHA DOLL CONFIGURATION, ACCESSORIES AND PACKAGING	MGA ENTERTAINMENT	N
COP0400053	20040407	20240407	CLOE DOLL CONFIGURATION, ACCESSORIES AND PACKAGING	MGA ENTERTAINMENT INC.	N
COP0400054	20040407	20240407	BRATZ BOYZ DOLL SCULPTURE (MALE)	MGA ENTERTAINMENT INC.	N
COP0400055	20040407	20240407	BRATZ DOLL SCULPTURE (FEMALE)	MGA ENTERTAINMENT INC.	N
COP0400056	20040412	20240412	GUAMI	CRAZY SHIRTS, INC.	N
SUBTOTAL RECORDATION TYPE			10		
TMK0400266	20040405	20140405	ITALIA D'ORO	BOYD COFFEE COMPANY	N
TMK0400267	20040405	20091102	MILLION STARS	DANZIGER "DAN" FLOWER FARM	N
TMK0400268	20040405	20120115	VIP+	TIMBERCO, INC.	N
TMK0400269	20040406	20100313	DKNY	GABRIELLE STUDIO, INC.	N
TMK0400270	20040406	20120716	DKNY	GABRIELLE STUDIO, INC.	N
TMK0400271	20040406	20060228	DKNY	GABRIELLE STUDIO, INC.	N
TMK0400272	20040406	20131130	BJC	CANON KABUSHIKI KAISHA	N
TMK0400273	20040406	20070204	PROCLEAR	COOPERVISION TECHNOLOGY, INC.	N
TMK0400274	20040406	20070624	WOOLFELT	NATIONAL NONWOVENS INC.	N
TMK0400275	20040406	20131123	PILSNER URQUELL	PLZENSKY PRAZDROJ, A.S.	N
TMK0400276	20040406	20131111	IDATECH	IDATECH, LLC	N
TMK0400277	20040406	20100125	GOLF DIGEST	ADVANCE MAGAZINE PUBLISHERS, INC	N
TMK0400278	20040406	20070331	VISAGE	VISAGE, INC.	N
TMK0400279	20040406	20090626	WALTHER	UMAREX SPORTWAFFEN GMBH & CO. KG	N
TMK0400280	20040406	20130606	WALTHER IN A BOW	UMAREX SPORTWAFFEN GMBH & CO. KG	N
TMK0400281	20040406	20050829	PPK/S	UMAREX SPORTWAFFEN GMBH & CO. KG	N
TMK0400282	20040406	20050719	PPK	UMAREX SPORTWAFFEN GMBH & CO. KG	N
TMK0400283	20040406	20050822	TPH	UMAREX SPORTWAFFEN GMBH & CO. KG	N
TMK0400284	20040406	20060416	PP	UMAREX SPORTWAFFEN GMBH & CO. KG	N
TMK0400285	20040407	20131202	BRATZ	MGA ENTERTAINMENT, INC.	N
TMK0400286	20040407	20131028	MAX	BROOKSTONE COMPANY, INC.	N
TMK0400287	20040407	20130207	BRISTOL CREAM	ALLIED DOMECQ SPIRITS & WINE LTD	N
TMK0400288	20040407	20100111	CELEBREX	G.D. SEARLE LLC.	N
TMK0400289	20040407	20130123	ABERCROMBIE & FITCH	A & F TRADEMARK, INC.	N
TMK0400290	20040407	20130708	M4	COLT DEFENSE LLC.	N
TMK0400291	20040408	20050919	CORNERSTONE CELLARS	CORNERSTONE CELLARS, INC.	N
TMK0400292	20040408	20140124	RUBIK'S CUBE DESIGN	SEVEN TOWNS LTD.	N
TMK0400293	20040408	20130828	DESIGN (DOUGHBOY)	THE PILLSBURY COMPANY	N
TMK0400294	20040409	20130405	DON PEDRO	ALLIED DOMECQ ESPANA, S.A.	N
TMK0400295	20040409	20110903	VENERABLE	ALLIED DOMECQ ESPANA, S.A.	N
TMK0400296	20040412	20120609	BLUE CROSS	BLUE CROSS AND BLUE SHIELD ASSOC	N
TMK0400297	20040412	20110122	BLUE CROSS	BLUE CROSS AND BLUE SHIELD ASSOC	N
TMK0400298	20040412	20070127	BLUE CROSS	BLUE CROSS AND BLUE SHIELD ASSOC	N
TMK0400299	20040412	20081025	BLUE SHIELD	BLUE CROSS AND BLUE SHIELD ASSOC	N
TMK0400300	20040412	20060803	BLUE SHIELD	BLUE CROSS AND BLUE SHIELD ASSOC	N
TMK0400301	20040412	20070512	BLUE SHIELD	BLUE CROSS AND BLUE SHIELD ASSOC	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0400302	20040412	20130925	DESIGN ONLY	BLUE CROSS AND BLUE SHIELD ASSOC	N
TMK0400303	20040412	20060518	DESIGN ONLY	BLUE CROSS AND BLUE SHIELD ASSOC	N
TMK0400304	20040412	20061230	DESIGN ONLY	BLUE CROSS AND BLUE SHIELD ASSOC	N
TMK0400305	20040412	20070113	DESIGN ONLY	BLUE CROSS AND BLUE SHIELD ASSOC	N
TMK0400306	20040412	20140315	DESIGN ONLY	BLUE CROSS AND BLUE SHIELD ASSOC	N
TMK0400307	20040412	20120707	DESIGN ONLY	BLUE CROSS AND BLUE SHIELD ASSOC	N
TMK0400308	20040412	20120729	DESIGN ONLY	BLUE CROSS AND BLUE SHIELD ASSOC	N
TMK0400309	20040412	20121124	DESIGN ONLY	BLUE CROSS AND BLUE SHIELD ASSOC	N
TMK0400310	20040412	20110529	JACK SPADE WARREN STREET NEW YORK	KATE SPADE, LLC	N
TMK0400311	20040412	20120611	JACK SPADE	KATE SPADE, LLC	N
TMK0400312	20040412	20120611	KATE SPADE	KATE SPADE, LLC	N
TMK0400313	20040412	20130610	KATE SPADE	KATE SPADE, LLC	N
TMK0400314	20040412	20130923	K$	KATE SPADE, LLC	N
TMK0400315	20040412	20130923	DESIGN ONLY	KATE SPADE, LLC	N
TMK0400316	20040412	20131221	91A	HEWLETT-PACKARD DEVELOPMENT CO.	N
TMK0400317	20040412	20131228	98A	HEWLETT-PACKARD DEVELOPMENT CO.	N
TMK0400318	20040412	20131228	75A	HEWLETT-PACKARD DEVELOPMENT CO.	N
TMK0400319	20040412	20131228	95A	HEWLETT-PACKARD DEVELOPMENT CO.	N
TMK0400320	20040412	20140210	BOB'S STEAK & CHOP HOUSE	SILVEROAK HOLDINGS, LTD.	N
TMK0400321	20040412	20120709	O	LGH-III, LLC	N
TMK0400322	20040412	20110814	DESIGN ONLY	ONLY THE BEST, INC.	N
TMK0400323	20040412	20130218	PROSPECT 1870	LOUIS DE WET TRUST	N
TMK0400324	20040413	20140807	SABRITONES	FRITO-LAY NORTH AMERICA, INC.	N
TMK0400325	20040413	20131220	STANT	STANT MANUFACTURING, INC.	N
TMK0400326	20040413	20100912	QUALITY DIGITAL DEVICES...TODAY	QINTAR TECHNOLOGIES, INC.	N
TMK0400327	20040413	20140120	HUGLU	INVESTMENT DEVELOPMENT CORP.	N
TMK0400328	20040413	20130617	ARMSCO LOGO	INVESTMENT DEVELOPMENT CORP.	N
TMK0400329	20040413	20140120	HUGLU LOGO	INVESTMENT DEVELOPMENT CORP.	N
TMK0400330	20040413	20130107	DESIGN OF THREE TREE VINES	ALLIED DOMECQ ESPANA S.A.	N
TMK0400331	20040413	20101110	CARLOS I	ALLIED DOMECQ ESPANA S.A.	N
TMK0400332	20040416	20090509	POLAR ICE	CORBY DISTRILLERIES LIMITED	N
TMK0400333	20040416	20090502	POLAR ICE AND BEAR DESIGN	CORBY DISTRILLERIES LIMITED	N
TMK0400334	20040416	20130826	WAGAN WITH DESIGN	HONOR INTERNATIONAL LTD.	N
TMK0400335	20040416	20100711	TARYN ROSE	TARYN ROSE INTERNATIONAL LLC.	N
TMK0400336	20040416	20130121	DESIGN MARK	ANDERL, RALPH	N
TMK0400337	20040416	20110116	VIS	VIS RACING SPORTS INC.	N
TMK0400338	20040421	20131012	BIG DOG SPORTSWEAR	BIG DOG HOLDING, INC.	N
TMK0400339	20040421	20081210	CASUAL CORNER	RETAIL BRAND ALLIANCE, INC.	N
TMK0400340	20040421	20121213	WILDROOT	THE STEPHAN CO.	N
TMK0400341	20040421	20140828	AGORAL	WARNER-LAMBERT COMPANY LLC.	N
TMK0400342	20040421	20080407	P99	CARL WALTHER GMBH	N
TMK0400343	20040422	20130708	JUNGLE RUNNER SOLE (SHOE DESIGN)	WOLVERINE OUTDOORS INC.	N
TMK0400344	20040422	20131007	M CIRCLE DESIGN	WOLVERINE OUTDOORS INC.	N
TMK0400345	20040422	20100606	CRYOLABEL	ELECTRONIC IMAGING MATERIALS INC	N
TMK0400346	20040422	20140417	TOYOTA	TOYOTA MOTOR CORPORATION	N

SUBTOTAL RECORDATION TYPE 91

TOTAL RECORDATIONS ADDED THIS MONTH 91

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 5 2004)

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

SUMMARY: Presented herein are the copyrights, trademarks, and trade names recorded with U.S. Customs and Border Protection during the month of May 2004. The last notice was published in the CUSTOMS BULLETIN on May 5, 2004.

Corrections or updates may be sent to: Department of Homeland Security, U.S. Customs and Border Protection, Office of Regulations and Rulings, IPR Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: George Frederick McCray, Esq., Chief, Intellectual Property Rights Branch, (202) 572–8710.

Dated: June 8, 2004.

GEORGE FREDERICK MCCRAY, ESQ.,
Chief,
Intellectual Property Rights Branch.

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP0400057	20040506	20240506	SPIDER MAN 2 STYLE GUIDE	SONY PICTURES ENTERTAINMENT INC.	N
COP0400058	20040517	20240517	ABC ANIMAL TRAIN	POCKETS OF LEARNING, LLC	N
COP0400059	20040519	20240519	RAIDMAX SCORPIO	RAIDTRONICS INC.	N
COP0400060	20040526	20230526	BVLGARI CATALOG SPRING/SUMMER 2003 LEATHER COLLECTION	BULGAN S.P.A.	N
SUBTOTAL RECORDATION TYPE		4			
TMK0400347	20040503	20131202	GOLDEN MOUNTAIN WITH DESIGN	EASTLAND FOOD CORPORATION	N
TMK0400348	20040503	20111218	NEXXUS (STYLIZED LETTERING)	NEXXUS PRODUCTS COMPANY	N
TMK0400349	20040503	20110417	NEXXUS	NEXXUS PRODUCTS COMPANY	N
TMK0400350	20040503	20130520	SUPERIOR WITH DESIGN	SUPERIOR TRADING COMPANY	N
TMK0400351	20040503	20140203	SOUNDPRO	QUEST TECHNOLOGIES, INC.	N
TMK0400352	20040503	20140120	WORKPLACE	WORKPLACE SYSTEMS INC.	N
TMK0400353	20040503	20050611	PRO SEAL AND DESIGN	PACER TECHNOLOGY	N
TMK0400354	20040503	20090221	PRO SEAL	PACER TECHNOLOGY	N
TMK0400355	20040503	20131007	RUNNING MAN DESIGN	WOLVERINE OUTDOORS, INC.	N
TMK0400356	20040503	20101121	STEP INTO A LEGEND	WOLVERINE WORLD WIDE INC.	N
TMK0400357	20040505	20120510	PEPSODENT	CHURCH & DWIGHT COMPANY	N
TMK0400358	20040505	20060823	CLOSE UP	CHESEBROUGH-POND'S USA INC.	N
TMK0400359	20040505	20061108	CLOSE-UP	CHESEBROUGH-POND'S INC.	N
TMK0400360	20040505	20081020	CLOSE UP & DESIGN	CHESEBROUGH-POND'S INC.	N
TMK0400361	20040505	20130928	LV LOGO	LOUIS VUITTON MALLETIER	N
TMK0400362	20040505	20130511	LV MONOGRAM	LOUIS VUITTON MALLETIER	N
TMK0400363	20040505	20131227	MB (STYLIZED)	MILWAUKEE BREWERS BASEBALL CLUB	N
TMK0400364	20040505	20060123	MARQUIS	WATERFORD CRYSTAL LIMITED	N
TMK0400365	20040505	20130130	WATERFORD	WATERFORD WEDGWOOD PLC	N
TMK0400366	20040505	20130723	I.P.S. (STYLIZED)	IPS CORPORATION	N
TMK0400367	20040505	20130624	DH7	AMEGNIZIN, LOUIS	N
TMK0400368	20040507	20131014	S&W	SMITH & WESSON CORPORATION	N
TMK0400369	20040518	20110815	MONET	L.C. LICENSING, INC.	N
TMK0400370	20040518	20120625	MONET MODERN MEETS CLASSIC	L.C. LICENSING, INC.	N
TMK0400371	20040518	20100919	JUICY JEANS	L.C. LICENSING, INC.	N
TMK0400372	20040518	20091012	JUICY	L.C. LICENSING, INC.	N
TMK0400373	20040518	20120509	JUICY COUTURE	L.C. LICENSING, INC.	N
TMK0400374	20040518	20140207	M&M'S	MARS, INCORPORATED	N
TMK0400375	20040518	20120813	DESIGN ONLY	BUILD-A-BEAR WORKSHOP, INC.	N
TMK0400376	20040518	20140208	DESIGN ONLY	SALVATORE FERRAGAMO ITALIA S.P.A	N
TMK0400377	20040518	20130819	EL PINARENO (STYLIZED)	TROPICAL TOBACCO, INC.	N
TMK0400378	20040518	20140316	DESIGN ONLY	COACH	N
TMK0400379	20040518	20071223	SUPRACOR	SUPRACOR, INC.	N
TMK0400380	20040518	20120121	SUPRACOR	SUPRACOR, INC.	N
TMK0400381	20040518	20090509	CAVS & DESIGN	GUND BUSINESS ENTERPRISES, INC.	N
TMK0400382	20040525	20130922	CHRISTIAN DIOR	CHRISTIAN DIOR COUTURE, S.A.	N
TMK0400383	20040525	20130302	MISCELLANEOUS DESIGN	GARRETT ELECTRONICS INC.	N
TMK0400384	20040525	20131125	FLIP-N-DIP	TOPPS COMPANY INC.	N
TMK0400385	20040525	20120630	ENCOUNTER	VICTORIA'S SECRET BEAUTY	N
TMK0400386	20040525	20061105	1ST CLASS	PREMIER MANUFACTURING INC.	N
TMK0400387	20040526	20070304	LICKY LOGO DESIGN	JOE BOXER COMPANY LLC.	N
TMK0400388	20040526	20060701	JOE BOXER	JOE BOXER COMPANY LLC.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0400389	20040526	20140806	SUPERIOR AND DESIGN	CHUNG INCORPORATED	N
TMK0400390	20040526	20131216	DESIGN	OVERSEAS FACTOR CORPORATION	N
TMK0400391	20040526	20070610	KATE SPADE (STYLIZED LETTERING)	KATE SPADE LLC.	N
TMK0400392	20040526	20070624	KATE SPADE AND DESIGN	KATE SPADE LLC.	N
TMK0400393	20040526	20070527	KATE SPADE	KATE SPADE LLC.	N
TMK0400394	20040526	20140515	COAD	NORAC INC.	N
TMK0400395	20040526	20130318	CASK 232	ANGUILLA RUMS LIMITED	N
TMK0400396	20040526	20070624	CASK 232	ANGUILLA RUMS LIMITED	N
TMK0400397	20040526	20131207	PATRON	CARIBBEAN DISTILLERS CORPORATION	N
TMK0400398	20040526	20080331	PATRON BOTTLE SHAPE	CARIBBEAN DISTILLERS CORPORATION	N
TMK0400399	20040526	20060123	PATRON OX CAFE (STYLIZED LETTERING)	CARIBBEAN DISTILLERS CORPORATION	N
TMK0400400	20040526	20041122	CITRONGE (STYLIZED LETTERING)	CARIBBEAN DISTILLERS CORPORATION	N
TMK0400401	20040526	20120609	PATRON BOTTON DESIGN	CARIBBEAN DISTILLERS CORPORATION	N
TMK0400402	20040526	20060730	BEE DESIGN	CARIBBEAN DISTILLERS CORPORATION	N
TMK0400403	20040526	20110821	PLANTERS GOLD RUM PYRATE RESERVE BOTTLE	ANGUILLA RUMS LIMITED	N
TMK0400404	20040526	20130617	PYRAT	ANGUILLA RUMS LIMITED	N
TMK0400405	20040526	20070429	PYRAT RUM	ANGUILLA RUMS LIMITED	N
TMK0400406	20040526	20100912	PYRAT RUM CASK 232 & BOTTLE DESIGN	ANGUILLA RUMS LIMITED	N
TMK0400407	20040526	20100912	PYRAT RUM CASK 232 & BOTTLE DESIGN	ANGUILLA RUMS LIMITED	N
TMK0400408	20040527	20100327	SHEET SUPENDERS WITH DESIGN	MARIA T. THORNHILL	N
TMK0400409	20040527	20110804	CRISTAL CHAMPAGNE	CHAMPAGNE LOUIS ROEDERER	N
TMK0400410	20040527	20080527	CRISTAL CHAMPAGNE & DESIGN	CHAMPAGNE LOUIS ROEDERER	N

SUBTOTAL RECORDATION TYPE 64

TOTAL RECORDATIONS ADDED THIS MONTH 68

Notice of Cancellation of Customs Broker Permit

AGENCY: Bureau of Customs and Border Protection, U.S. Department of Homeland Security

ACTION: General notice

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker local permits are canceled without prejudice.

Name	Permit #	Issuing Port
Pro-Log Services, Inc.	5301–010	Houston
Ernesto Bustamante Dba Associate Brokerage	26–03–AQG	Nogales
Alba F. Ibarrola	26–02–AND	Nogales
Capin Brokerage Inc. Dba Capin Vyborny	26–016	Nogales
Robert E. Finley	19–03–H28	Mobile
Air Express International	3024	San Francisco
Burlington Air Express	6963–P	San Francisco
Columbia Shipping Inc. (SFO)	12259–P	San Francisco
Pacific Freight Group International	A –827	San Francisco
John L. Brun	4346	San Francisco
Darrel J. Sekin & Co.	6375	San Francisco
Fracht FWO Inc.	11887–P	San Francisco
"K" Air Brokerage, Inc.	9610–P	San Francisco
Kinetsu Intermodal (USA)	9849 (SF)	San Francisco
George W. Martin	10854	San Francisco
SBA Consolidators, Inc.	6622	San Francisco
Dateline Forwarding Services Inc.		San Francisco
Migeul Ramon Padilla Dba MR Padilla Co.		San Francisco
Sherri Linden		San Francisco
Dale Melford Aldeous Zerda		San Francisco
Howard Harty, Inc.		San Francisco
West Coast Customs Brokers (Los Angeles)		San Francisco
Allan T. Low		San Francisco
Diamond International		San Francisco
Frank Cadenhead		San Francisco
MSAS Cargo International Inc.		San Francisco
Richard G. Dumont & Associates		San Francisco
SH Brogan Consulting Inc.		San Francisco

Name	Permit #	Issuing Port
Surface Freight Corp.		San Francisco
Vital Int'l Freight Services, Inc.		San Francisco

DATED: June 1, 2004

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, June 10, 2004 (69 FR 32604)]

Retraction of Revocation Notice

AGENCY: Bureau of Customs and Border Protection, U.S. Department of Homeland Security

ACTION: General Notice

SUMMARY: The following Customs and Border Protection National Permits were erroneously included in a list of revocations. See, Notice of Cancellation of Customs Broker Permit, dated May 4, 2004 (69 FR 24656).

Name	Permit No.
D. J. Powers Company, Inc.	99–00012
Florence S. Hillman dba Hillman International Services	99–00580
Rotra Brokerage Services Inc.	99–00162
John S. James Company	99–00155
Page International	99–00285
Cargo Brokers International, Inc.	99–00449
Jay A. Mittleman	99–00123

The above-identified National Permits remain valid.

DATED: June 2, 2004

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, June 10, 2004 (69 FR 32604)]

Notice of Cancellation of Customs Broker License

AGENCY: Bureau of Customs and Border Protection, U.S. Department of Homeland Security

ACTION: General Notice

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker license is canceled without prejudice.

Name	License #	Issuing Port
Secure Custom Brokers, Inc.	09213	New York

DATED: June 2, 2004

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, June 10, 2004 (69 FR 32605)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, June 9, 2004,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE CLASSIFICATION OF PORTABLE LOCKING GUN CASES

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of a tariff classification ruling letter and revocation of any treatment relating to the classification of portable locking gun cases.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (CBP) intends to revoke one ruling letter relating to the tariff classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of portable locking gun cases. Similarly, CBP proposes to revoke any treatment previously accorded by it to substantially identical merchandise

DATE: Comments must be received on or before July 23, 2004.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Ar-

rangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Textiles Branch, (202) 572–8822.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. section 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke one ruling letter pertaining to the tariff classification of portable locking gun cases. Although in this notice, CBP is specifically referring to the revocation of New York Ruling Letter (NY) G89340 dated April 2, 2001, (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to sub-

stantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY G89340, CBP ruled that item numbers SGS–1124R and SGS–1125R were classifiable in subheading 7616.99.5090, HTSUSA, which provides for "Other articles of aluminum: Other: Other: Other, Other: Other: Other". Since the issuance of this ruling, CBP has reviewed the classification of these items and has determined that the cited ruling is in error. We have determined that the subject gun cases, identified as item numbers SGS–1124R and SGS–1125R, should be classified in subheading 4202.99.9000, HTSUSA, which provides for "Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or paperboard, or wholly or mainly covered with such materials or with paper: Other: Other: Other", which accurately describes the merchandise. Heading 4202, HTSUSA, has *eo nomine* provided for "gun cases" which, in this instance, would include all forms of the article because there are no terms of limitation associated with this exemplar. Furthermore, the 42.02 EN notes that the containers of this heading may be rigid or with a rigid foundation and since "gun cases" are included in the first part of the heading, before the semi-colon, they may be of any material.

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke NY G89340 and any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter (HQ) 967109 (Attachment B). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by CBP to substantially identical transactions that are contrary to the determina-

tion set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

Dated: June 2, 2004

Greg Deutsch for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY G89340
April 2, 2001
CLA–2–76:RR:NC:N1:113 G89340
CATEGORY: Classification
TARIFF NO.: 7616.99.5090

MS. KERRIE L. GOODYEAR
GLOBAL FAIRWAYS
6680 Brandt St., Ste. 100
Romulus, MI 48174

RE: The tariff classification of two gun safes from China

DEAR MS. GOODYEAR:

In your letter dated March 27, 2001, you requested a tariff classification ruling.

The merchandise is two styles of portable gun safe (item numbers SGS–1124R and SGS–1125R). Both are rectangular, foam-lined, aluminum cases with carry handles. Each case has 2 combination locks and 2 traditional locks. Item number SGS–1125R is a heavier model and features mylar wheels.

The applicable subheading for the gun safes will be 7616.99.5090, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of aluminum, other. The rate of duty will be 2.5 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist James Smyth at 212–637–7008.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967109
CLA–2 RR:CR:TE 967109 ASM
CATEGORY: Classification
TARIFF NO.: 4202.99.9000

MS. KERRIE L. GOODYEAR
GLOBAL FAIRWAYS
6680 Brandt St., Suite 100
Romulus, MI 48174

RE: Revocation of NY G89340; Classification of Portable Locking Gun Cases; Containers of Heading 4202, HTSUSA

DEAR MS. GOODYEAR:

This is in regard to the Customs and Border Protection (CBP) New York Ruling Letter (NY) G89340, issued to you on April 2, 2001. We have reviewed this ruling and determined that the classification provided for this merchandise is incorrect. This ruling revokes NY G89340 by providing the correct classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) for portable locking gun cases.

FACTS:

The merchandise involves two styles of portable gun cases (item numbers SGS–1124R; SGS–1125R). The article identified as item number SGS–1124R is a rectangular shape (outside dimensions — 16.5 x 8.5 x 9 inches) double pistol case, constructed of aluminum, which stores up to 4 pistols. The case features an ergonomic carrying handle, heavy-duty combination locks, and reinforced metal corners. The interior of the case includes impact resistant foam. The case is approved for airline travel and includes a zippered travel cover. The article identified as item number SGS–1125R is a rectangular shape (outside dimensions — 32 x 8.5 x 13.5 inches) double breakdown case constructed of aluminum which stores two break down shot guns. The case features mylar wheels built into the case for travel convenience, an ergonomic carrying handle, and an interior with impact resistant foam. The outside of the case has been reinforced with metal corners and is fitted with heavy-duty key locks and combination locks. The case has been approved for airline travel and includes a zippered travel cover.

In NY G89340, dated April 2, 2001, CBP found that item numbers SGS–1124R and SGS–1125R were classified in subheading 7616.99.5090, HTSUSA, which provides for "Other articles of aluminum: Other: Other: Other, Other: Other: Other".

ISSUE:

What is the proper classification for the merchandise?

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be

classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Heading 4202, HTSUSA, is a two part heading which covers only the articles specifically named therein and similar containers. In this instance, we are concerned with the first portion of the heading which covers trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers.

As noted above, "gun cases" is an *eo nomine* exemplar in heading 4202, HTSUSA. As such, "gun cases" is not a use provision because the term describes the merchandise by name, not by use. See Clarendon Marketing, Inc. v. United States, 144 F.3d 1464, 1467 (Fed. Cir. 1998); and Nidec Corp. v. United States, 68 F.3d 1333, 1336 (Fed. Cir. 1995). It is also important to note that "An eo nomine designation, with no terms of limitation, will ordinarily include all forms of the named article." Hayes-Sammons Co. v. United States, 55 C.C.P.A. 69, 75 (1968). Accordingly, a use limitation should not be read into an *eo nomine* provision unless the name itself inherently suggests a type of use. See Pistorino & Co. v. United States, 599 F.2d 444, 445 (CCPA 1979); United States v. Quon Quon Co., 46 C.C.P.A. 70, 72–73 (1959); F.W. Myers & Co. v. United States, 24 Cust. Ct. 178, 184–85, (1950).

Heading 4202, HTSUSA, has *eo nomine* provided for "gun cases" which, in this instance, would include all forms of the article because there are no terms of limitation associated with this exemplar. Furthermore, the 42.02 EN notes that the containers of this heading may be rigid or with a rigid foundation and since "gun cases" are included in the first part of the heading, before the semi-colon, they may be of any material. See 42.02 EN.

In Totes, Inc. v. United States, 18 C.I.T. 919, 865 F. Supp. 867, 871 (1994), the Court of International Trade concluded that the "essential characteristics and purpose of the Heading 4202 exemplars are . . . to organize, store, protect and carry various items." In this instance, the subject case, unlike any of the exemplars in the EN to heading 3926, is intended to store, protect, organize and transport a gun either inside or outside the home.

We further note the following dictionary definition for "case" taken from the 1979 Webster's New Collegiate Dictionary, i.e., ". . . a box or receptacle for holding something . . .". Thus, a "case" could conceivably include any type of receptacle, stationary or portable, designed to hold something. In fact, the promotional literature for the subject gun cases (item numbers SGS–1124R and SGS–1125R) specifically promotes the portability features of these cases, *e.g.*, ergonomic carrying handle, zipper travel cover, approved for airline travel, mylar wheels built into the case (item number SGS–1125R).

In a recent CBP ruling, HQ 966544, dated March 2, 2004, it was held that a portable traveling gun case, featuring carrying handles, fitted key and combination locks, and approved for airline travel, was classifiable as a container of subheading 4202.99.9000, HTSUSA. We further note that CBP has

previously classified articles identified as gun cases in heading 4202, HTSUSA. NY G85641, dated February 12, 2001, involved the tariff classification of gun cases and a determination as to preferential treatment under the Caribbean Basin Economic Recovery Act (CBERA). In that ruling, the samples consisted of upper and lower shells of pressed wood formed to shape the main body of the case. The fur-lined interior was fitted to hold the gun/accessories by means of wood blocks and dividers. The samples submitted each had carrying handles and varying exteriors of textile and leather. With respect to the classification of all the textile covered cases (Style 1215, 1215DW, 1215D, and 1215E), CBP found that those gun cases were each classifiable in subheading 4202.92, HTSUSA. In NY K82654, dated February 5, 2004, a fitted gun case, with a carrying handle, manufactured of neoprene, and wholly covered on the exterior surface with polyester fabric, was deemed to be of a kind *eo nomine* provided for in heading 4202, HTSUSA.

In view of the foregoing, CBP has determined that item numbers SGS–1124R and SGS–1125R, are properly classified as gun cases in heading 4202, HTSUSA, and are *eo nomine* provided for in the exemplars for that heading.

HOLDING:

NY G89340, dated April 2, 2001, is hereby revoked.

The subject gun cases, identified as item numbers SGS–1124R and SGS–1125R, are classified in subheading 4202.99.9000, HTSUSA, which provides for "Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or paperboard, or wholly or mainly covered with such materials or with paper: Other: Other: Other." The general column one duty rate is 20% percent ad valorem.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

19 CFR PART 177

PROPOSED MODIFICATION OF RULING LETTER AND TREATMENT RELATING TO CLASSIFICATION OF A SECURITY INDICATOR ASSEMBLY

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed modification of a ruling letter and treatment relating to tariff classification of a security indicator assembly.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of a security indicator assembly and to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before July 23, 2004.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, NW, Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Keith Rudich, General Classification Branch, (202) 572–8782.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of a security indicator assembly. Although in this notice Customs is specifically referring to one ruling, NY E81170, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY E81170, dated May 27, 1999, set forth as "Attachment A" to this document, Customs found that a security indicator assembly was classified in subheading 8544.30.0000, HTSUSA, as ignition wiring sets and other wiring harnesses of a type used in vehicles, aircraft or ships.

Customs has reviewed the matter and determined that the correct classification of the security indicator assembly is in subheading 8512.20.4040, HTSUSA, which provides for electrical lighting or signaling equipment, of a kind used for cycles or motor vehicles; parts thereof: other lighting or visual signaling equipment: visual signaling equipment, for vehicles.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to modify NY E81170, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter (HQ) 966661, as set forth in "Attachment B" to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated: May 28, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY E81170
May 27, 1999
CLA–2–85:RR:NC:]]12 E 81170
CATEGORY: Classification
TARIFF NO.: 8537.10.9070: 8544.30.0000: 8708.29.5060

MS. LAURA LYONS
ALPS AUTOMOTIVE, INC.
1500 Atlantic Boulevard
Auburn Hills, MI 48326

RE: The tariff classification of automotive components from Japan and Mexico

DEAR MS. LYONS:

In your letter dated April 23, 1999 you requested a tariff classification ruling.

As indicated by the submitted samples, there are three types of components in question. One item is identified as a Mode Control Assembly — Part# SANWA 1804A. and contains several controls in the form of push buttons and rotating knobs that regulate the air conditioning, defroster and general air flow within a vehicle. The second item is identified as a Security Indicator — Part XSANWD9011B. and consists of an electric wiring harness with a connector attached to one end and a plastic housing containing a small printed circuit board and LED at the other end. The plastic housing fits over the post of the door lock and the LED is illuminated when the security system is activated. The third item consists of plastic bezels that are molded plastic covers for the various door switch mechanisms in a vehicle.

The applicable subheading for the Mode Control Assembly-Part#SANWA1804A will be 8537.10.9070, Harmonized Tariff Schedule of the United States (HTS), which provides for other boards, panels, ... for electric control or the distribution of electricity, . . . : For a voltage not exceeding 1,000V. The rate of duty will be 2.7 percent ad valorem. The applicable subheading for the Security Indicator-Part #SANWD9O11B will be 8544.30.0000, HTS, which provides for ignition wiring sets and other wiring harnesses of a type used in vehicles aircraft or ships. The rate of duty will be 5 percent ad valorem. The applicable subheading for the plastic bezels will

be 8708.29.5060, HTS, which provides for other parts and accessories of bodies: Other: Other. The rate of duty will be 2.5 percent ad valorem

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling, or the control number indicated above should be provided with the entry documents filed at thc time this merchandise is imported. lf you have any questions regarding the ruling, contact National Import Specialist David Curran at 212–637–7049.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966661
CLA–2 RR:CR:GC 966661 KBR
CATEGORY: Classification
TARIFF NO.: 8512.20.4040

MS. CHRISTIE SICKEN
CUSTOMS ANALYST
ALPS
1500 Atlantic Boulevard
Auburn Hills, MI 48326

RE: Reconsideration of NY E81170; Security Indicator

DEAR MS. SICKEN:

This is in reference to New York Ruling Letter (NY) E81170, issued to you by the Customs National Commodity Specialist Division, New York, on May 27, 1999. That ruling concerned the classification of several automobile components, including a security indicator with an electric wiring harness, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). We have reviewed NY E81170 and determined that the classification provided for the security indicator with wiring harness is incorrect.

FACTS:

In NY E81170, it was determined that the ALPS item number SANWD9011B security indicator was classifiable in subheading 8544.30.0000, HTSUSA, as ignition wiring sets and other wiring harnesses of a type used in vehicles, aircraft or ships. The security indicator consists of a wiring harness with a connector attached to one end and a plastic housing containing a small printed circuit board and an LED at the other end. The plastic housing fits over the post of the door lock and the LED is illuminated when the security system is activated. The LED is labeled "SECURITY". The wires measure approximately 10 inches in length.

We have reviewed that ruling and determined that the classification of the security indicator is incorrect. This ruling sets forth the correct classification.

ISSUE:

Is a security indicator with wiring harness properly classified under the HTSUSA as a wiring harness or as signaling equipment?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). Under GRI 1, merchandise is classifiable according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In interpreting the headings and subheadings, Customs looks to the Harmonized Commodity Description and Coding System Explanatory Notes (EN). Although not legally binding, they provide a commentary on the scope of each heading of the HTSUSA. It is Customs practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUSA provisions under consideration are as follows:

8512	Electrical lighting or signaling equipment (excluding articles of heading 8539), windshield wipers, defrosters and demisters, of a kind used for cycles or motor vehicles; parts thereof:
	* * * * *
8512.20	Other lighting or visual signaling equipment:
8512.20.40	Visual signaling equipment
8512.20.4040	For vehicles of subheading 8701.20 or heading 8702, 8703, 8704, 8705 or 8711
8544	Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fiber cables, made up of individually sheathed fibers, whether or not assembled with electric conductors or fitted with connectors:
	* * * * *
8544.30.0000	Ignition wiring sets and other wiring sets of a kind used in vehicles

The article at issue is a security indicator comprised of a wiring harness with a connector attached to one end and a plastic housing containing a small printed circuit board and an LED on the other end. The ENs for heading 8512, HTSUSA, exclude from this heading:

> (e) Insulated electric wire and cable, whether or not cut to length or fitted with connectors or made up in sets (e.g., ignition wiring sets) (heading 85.44).

The EN for heading 8544, HTSUSA, states that:

> Wire, cable, etc., remain classified in this heading if cut to length or fitted with connectors (e.g., plugs sockets, lugs, jacks, sleeves or terminals)

at one or both ends. The heading also includes wire, etc., of the types described above made up in sets (e.g., multiple cables for connecting motor vehicle sparking plugs to the distributor).

Customs has issued several rulings dealing with the classification of wiring harnesses and headings 8512 and 8544, HTSUSA. In distinguishing between headings 8512 and 8544, HTSUSA, Customs in HQ 951511 (June 1, 1992), found that a wiring harness with a bulb is classified in heading 8512, HTSUSA. However, when imported without a bulb a wiring harness would not be classified under heading, 8512, HTSUSA, but would be classified under heading 8544, HTSUSA, as insulated wire with connectors. *See also* HQ 953166 (January 14, 1993) (classifying a wiring harness with only a lamp socket but no bulb in heading 8544 and specifically distinguishing HQ 951511 whose article included bulbs).

In HQ 954945 (November 23, 1993), Customs looked at the *function* an automobile rear tail light assembly performed. The rear tail light assembly provided rear end illumination for night driving, turn signaling, brake lighting, hazard signaling, and illumination in reverse gear. Customs determined that, under GRI 3(b), the essential character of a combination lamp assembly which included a hazard light performed as visual signaling equipment and therefore was classified under subheading 8512.20.40, HTSUSA.

In HQ 962654 (April 5, 1999), which corrected a clerical error in NY D86618, Customs found that an automotive wiring and LED warning light assembly was classified in subheading 8512.20.4040, HTSUSA. *See also* HQ 963831 (January 11, 2001) (finding that due to its "principal use," an LED warning system is classified in heading 8512, HTSUSA). In NY H87857 (February 1, 2002), Customs found that a seatbelt sensor warning light assembly was classified in subheading 8512.20.4040, HTSUSA.

Like the merchandise classified in HQ 962654, the instant article is not simply a wiring harness with a connector on one or both ends. One end of the instant article has a security indicator LED assembly. The purpose of the indicator is to warn that the security system is active. This is a visual signaling function. Because the function of the instant security indicator is to provide a visual warning to the automobile operator and it is imported with the LED included, the security indicator is classified under subheading 8512.20.4040, HTSUSA, as visual signaling equipment for vehicles.

HOLDING:

The security indicator is classified under subheading 8512.20.4040, HTSUSA, as electrical lighting or signaling equipment, of a kind used for cycles or motor vehicles; parts thereof: other lighting or visual signaling equipment: visual signaling equipment, for vehicles.

EFFECT ON OTHER RULINGS:

NY E81170 dated May 27, 1999, is **modified**.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

19 CFR PART 177

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF THE FETCH TOTE™ DOG TOY

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed modification of ruling letter and revocation of treatment relating to tariff classification of the Fetch Tote™ dog toy.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of the Fetch Tote™ dog toy under the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs also intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before July 23, 2004.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at Customs and Border Protection, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Neil S. Helfand, General Classification Branch, (202) 572–8791.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade com-

munity needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to modify a ruling letter which pertains to the classification of the Fetch Tote™ dog toy. Although in this notice Customs is specifically referring to ruling NY J89264, this notice covers any rulings on merchandise which may exist but has not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY J89264, dated September 25, 2003, and set forth as Attachment A to this document, Customs classified the Fetch Tote™ dog toy under subheading 9506.61.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as: "Articles and equipment for general physical exercise, gymnastics, athletics, other sports (in-

cluding table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Balls, other than golf balls and table-tennis balls: Lawn-tennis balls."

It is now Customs position that the Fetch Tote™ dog toy is classified under subheading 4016.99.2000, HTSUSA, as "Other articles of vulcanized rubber other than hard rubber: Other: Other: Toys for pets."

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to modify NY J89264 and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 966988, which is set forth as Attachment B to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

DATED: June 2, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY J89264
September 25, 2003
CLA–2–95:RR:NC:2:224 J89264
CATEGORY: Classification
TARIFF NO.: 9506.61.0000; 4202.92.9026

MS. JENNIFER SCOTT
EXPEDITORS INT'L OF WASHINGTON, INC
21318 64th Avenue, South
Kent, WA 98032

RE: The tariff classification of a Fetch Tote from China

DEAR MS. SCOTT:

In your letter dated September 16, 2003, you requested a tariff classification ruling, on behalf of Canine Hardware Inc., your client.

You are requesting the tariff classification on a product that is described as a Fetch Tote, item 02450. The Fetch Tote, designed as a belt pouch (with a plastic clip to attach the pouch to a belt) is constructed of nylon fabric and a

heavy mesh construction for the ball holding cup. When retrieving with your pet, the mesh construction allows the wet ball to dry quickly upon return from your pet. The ball is identical to a tennis ball in shape and size, including the napped fabric material used for tennis ball covers. The product is sold and marketed as a set. You are also asking for the tariff classifications for the ball and the tote, if imported separately. Your sample will be returned, as requested.

The Explanatory Notes to the Harmonized Tariff Schedule of the United States (HTS) provide guidance in the interpretation of the Harmonized Commodity Description and Coding System at the international level. Explanatory Note X to GRI 3 (b) provides that the term "goods put up in sets for retail sale" means goods that: (a) consist of at least 2 different articles which are, prima facie, classifiable in different headings; (b) consist of articles put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without re-packing. Goods classifiable under GRI 3 (b) are classified as if they consisted of the material or component which gives them their essential character, which may be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the article.

The Fetch Tote, item # 02450, is considered a set for tariff classification purposes. The essential character is imparted to the set by the tennis ball portion of the product therefore the article will be classified in Chapter 95 of the HTS as lawn-tennis balls.

The applicable subheading for the Fetch Tote set, item # 02450, and the tennis balls, if imported separately, will be 9506.61.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for balls, other than golf balls and table-tennis balls: lawn-tennis balls. The rate of duty will be free. The applicable subheading for the tote (belt pouch) portion without the ball will be 4202.92.9026, Harmonized Tariff Schedule of the United States (HTS), which provides for trunks, suitcases, vanity cases, attache cases . . . holsters and similar containers . . . : other: with outer surface of sheeting or of textile materials: other . . . other: of man-made fibers. The rate of duty will be 17.8 % ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Tom McKenna at 646–733–3025.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 966988
CLA–2 RR:CR:GC 966988 NSH
CATEGORY: Classification
TARIFF NO.: 4016.99.2000

MS. JENNIFER SCOTT
EXPEDITORS INTERNATIONAL OF WASHINGTON, INC.
21318 - 64th Avenue South
Kent, WA 98032

RE: Modification of NY J89264; Fetch Tote™ dog toy

DEAR MS. SCOTT:

This is in response to an internal request for reconsideration of NY J89264, dated September 25, 2003, on the classification of the Fetch Tote™ under the Harmonized Tariff Schedule of the United States (HTSUS).

FACTS:

The merchandise at issue, item number 02450, is called a Fetch Tote™. It is made up of two components, a ball and accompanying belt pouch. The ball is non-pressurized and resembles a tennis ball due to its size and shape. It is covered in blue and white felt and has the word "Chuckit!" printed on it. The belt pouch is constructed of nylon fabric and mesh, serves as a holder for the ball, and has a plastic clip for attaching to a person's belt or pocket. Sewn into the pouch is the name of the product, the sentence "Sporting gear for dogs from Canine Hardware, Inc," and a picture of a dog. Additionally, there is a removable cardboard hang tag attached to the pouch. The hang tag states the name of the product, pictures a dog with a ball in its mouth and contains product information, stating that the mesh construction of the pouch allows the ball to dry out quickly after use by a dog.

On September 25, 2003, Customs issued NY J89264, holding that the Fetch Tote™ was classified under subheading 9506.61.00, HTSUS, which provides for "Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Balls, other than golf balls and table-tennis balls: Lawn-tennis balls." Pursuant to an internal request, this reconsideration is to determine whether the Fetch Tote™ should be classified under subheading 4016.99.20, HTSUS, which provides for "Other articles of vulcanized rubber other than hard rubber: Other: Other: Toys for pets."

ISSUE:

What is the classification under the HTSUS of the Fetch Tote™?

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the remaining GRIs.

Additional Rule of Interpretation (ARI) 1(a) states that in the absence of special language or context which otherwise requires, a tariff classification

controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. The ENs, although neither dispositive or legally binding, facilitate classification by providing a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

The HTSUS provisions under consideration are as follows:

4016	Other articles of vulcanized rubber other than hard rubber:
	Other:
4016.99	Other:
4016.99.20	Toys for pets
	* * * * * *
9506	Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:
	Balls, other than golf balls and table-tennis balls:
9506.61	Lawn-tennis balls

In NY J89264, Customs classified the Fetch Tote™ under subheading 9506.61.00, HTSUS, as a "tennis ball." In that ruling, Customs held that the Fetch Tote™, consisting of a tennis-like ball and nylon belt pouch for holding the ball, constituted a GRI 3(b) set wherein the essential character was derived from the tennis ball.

Heading 9506, HTSUS, applies to articles and equipment for general physical exercise, such as for sports and outdoor games. EN 95.06 states in pertinent part:

> This heading covers:
>
> . . .
>
> (B) **Requisites for other sports and outdoor games (other than** toys presented in sets, or separately, of **heading 95.03), e.g.:**
>
> . . .
>
> (6) Balls, other than golf balls and table-tennis balls, such as **tennis balls** . . . [Emphasis added].

Heading 9506, HTSUS, is a principal use provision and, therefore, subject to Additional U.S. Rule of Interpretation 1(a), HTSUS. In *Primal Lite v. United States*, 15 F. Supp. 2d 915 (CIT 1998); *aff'd* 182 F. 3d 1362 (CAFC 1999), the Court of International Trade addressed ARI 1(a), providing that the purpose of principal use provisions in the HTSUS is to classify particular merchandise according to the ordinary use of such merchandise, even though particular imported goods may be put to some atypical use. There-

fore, classification under the heading is controlled by the principal use in the United States of goods of that class or kind to which the imported goods belong at or immediately prior to the date of the importation. *Lenox v. Coll. v. United States*, 20 CIT, Slip Op. 96–30 (February 2, 1996). In sum, principal use can be defined as an article's use which exceeds any other single use.

To be classified under heading 9506, HTSUS, the ball at issue would have to be part of the class or kind of ball that is considered a "tennis ball." In determining the class or kind of goods to which an article belongs, Customs considers a variety of factors including: (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchaser; (3) the channels of trade in which the merchandise moves; (4) the environment of sale (accompanying accessories, manner of advertisement and display); and (5) the usage of the merchandise. *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F.2d 373 (1976), *cert. denied*, 429 U.S. 979.

Our examination of the ball at issue leads us to conclude that it is not of the class or kind of ball that is considered a tennis ball. Although the ball appears visually similar to tennis balls, we note that it is substantially different from regulation tennis balls. The International Tennis Federation, which is the governing body for the game of tennis, has issued, and updates annually, the "Rules of Tennis," in order to ensure uniformity of the rules of the game. *See* Rules of Tennis at www.itftennis.com. Appendix I of these rules sets forth the specifications for balls approved for play and it is apparent that the ball at issue is not the proper color for regulation play, being neither uniformly white nor yellow, and there are significant differences between the construction and quality of this ball from balls used in official play. Most apparent, the ball at issue appears to lack the required bound of regulation tennis balls and has noticeable deformities along its surface that would make it unfit for regulation play.

Additionally, it is apparent that the expectation of the ultimate purchaser of this ball is that it will be used as a dog toy and not as a tennis ball. This is because the ball, because of its design and accompanying belt pouch, is instantly recognized as intended to be a pet toy and as such will be sold as a pet toy with merchandise similarly intended for pets. Therefore, its exclusive purchase by people wishing to use it as a pet toy is unambiguous and Customs does not believe that this item would be sold with balls traditionally regarded as tennis balls. It is also apparent as well that the ball would not reasonably be used to engage in the game of tennis, nor would it be capable of being used for a game of tennis, because of its aforementioned physical attributes that make it unfit for that activity.

Finally, Customs has previously classified substantially similar merchandise under heading 4016, HTSUS. *See* NY J82456, dated April 21, 2003 (three multicolored "tennis balls" decorated with paw prints and intended for use as a dog toy), and NY I88407, dated December 3, 2002 (dog toy made of neoprene rubber covered with tennis ball material and shaped like a football).

In view of the foregoing, the ball is classified under subheading 4016.99.20, HTSUS, as "Other articles of vulcanized rubber other than hard rubber: Other: Other: Toys for pets."

HOLDING:

The ball is classified under subheading 4016.99.2000, HTSUSA, as "Other articles of vulcanized rubber other than hard rubber: Other: Other: Toys for pets." Additionally, the Fetch Tote™, which is comprised of both the ball and

belt pouch, is a GRI 3(b) set and classified under subheading 4016.99.2000, HTSUSA, as "Other articles of vulcanized rubber other than hard rubber: Other: Other: Toys for pets." The general column one rate of duty is 4.3 percent *ad valorem*. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

The belt pouch, which falls within textile category 670, will remain subject to visa and quota requirements regardless of where the set is classified. The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you or your client check, close to the time of shipment, the Textile Status Report for Absolute Quotas, previously available on the Customs Electronic Bulletin Board (CEBB), which is now available on the Bureau of Customs and Border Protection website at www.cbp.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you or your client should contact the local Bureau of Customs and Border Protection office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

EFFECT ON OTHER RULINGS:

NY J89264 is MODIFIED.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF A RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN SUNSHADES

AGENCY: Bureau of Customs & Border Protection; Department of Homeland Security.

ACTION: Notice of proposed revocation of a tariff classification ruling letter and revocation of treatment relating to the classification of certain sunshades.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that Customs & Border Protection (CBP) intends to revoke a ruling letter relating to the tariff classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of certain sunshades. Similarly, CBP proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before July 23, 2004.

ADDRESS: Written comments are to be addressed to Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at Customs and Border Protection, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Brian Barulich, Textiles Branch: (202) 572–8883.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke a ruling letter relating to the tariff classification of certain sunshades. Although in this notice CBP is specifically referring to NY K82882, dated February 20, 2004 (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or de-

cision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C.1625 (c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved with substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY K82882, CBP classified a sunshade from China under subheading 6306.99.0000, HTSUSA, which provides for "Tarpaulins, awnings and sunblinds; tents; sails for boats, sailboards or landcraft; camping goods: Other: Of other textile materials." Based on our review of heading 6306, HTSUSA, heading 6307, HTSUSA, the pertinent Explanatory Notes, and past CBP rulings, we find that a sunshade of the type subject to this notice, should be classified in subheading 6306.12.0000, HTSUSA, which provides for "Tarpaulins, awnings and sunblinds; tents; sails for boats, sailboards or landcraft; camping goods: Tarpaulins, awnings and sunblinds: Of synthetic fibers."

Pursuant to 19 U.S.C. 1625 (c)(1), CBP intends to revoke NY K82882 and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 967106 (Attachment B). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

DATED: June 4, 2004

Greg Deutsch for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY K82882
February 20, 2004
CLA–2–63:RR:NC:N3:351 K82882
CATEGORY: Classification
TARIFF NO.: 6306.99.0000

MS. JEANNE BERG
VP OPERATIONS
AIR FREIGHT INT'L d/b/a/ AFI CALIFORNIA
2381 Rosencrans Ave., Ste 100
El Segundo, CA 90245

RE: The tariff classification of a sunshade from China.

DEAR MS. BERG:

In your letter dated January 28, 2004, you requested a ruling on behalf of Gale Specific of Ontario, CA, on tariff classification.

You submitted a sample of an "Exterior Roll-Up Solar Shade" along with technical specifications, advertising information, and assembly and use instructions. The screen is woven of PVC-coated polyester yarns, making it a textile fabric for tariff purposes. The sunscreen is for outdoor use and is said to provide 80% UV protection. It may be installed over a window or elsewhere, such as a patio or deck. It rolls vertically up and down.

The applicable subheading for this product will be 6306.99.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for sunblinds: other: of other textile materials. The general rate of duty will be 4.5 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R.).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mitchel Bayer at 646–733–3102.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967106
CLA–2: RR:CR:TE: 967106 BtB
CATEGORY: Classification
TARIFF NO.: 6306.12.0000

MS. JEANNE BERG
VP OPERATIONS
AIR FREIGHT INTL d/b/a AFI CALIFORNIA
2381 Rosencrans Ave., Suite 100
El Segundo, CA 90245

RE: Revocation of NY K82882 regarding the tariff classification of a sunshade from China

DEAR MS. BERG:

This is in reference to New York Ruling Letter (NY) K82882, dated February 20, 2004, issued to you by the Bureau of Customs and Border Protection (CBP) regarding the classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of a sunshade from China. NY K82882 was issued in response to the January 28, 2004 ruling request letter that you filed on behalf of Gale Pacific (incorrectly called "Gale Specific" in NY K82882) of Ontario, California. We have reconsidered NY K82882 and have determined that the classification of the subject sunshade is not correct. This ruling sets forth the correct classification and revokes NY K82882.

FACTS:

The subject sunshade is more specifically described as an "Exterior Roll-Up Solar Shade." In your ruling request letter, you state the following:

> The product will be imported from China as a finished roller shade, complete with mounting brackets and pull chain. It is intended to be used as a sunshade to protect the home from heat, sun damage and glare. It is to be mounted on the outside of the house to reduce the damaging effect of the sun's rays on the interior area. . . . The shade can be mounted on an exterior window frame or patio. It is designed to filter sunlight before the sun enters the space. Thus is not suitable for installation on the interior of the unit. It does not completely block the sunlight, therefore is not effective as a "blackout" shade.

The marketing materials included with the ruling request letter show the instant sunshade mounted above home windows, doors and a patio. The roller shade is made of PVC-coated polyester yarn.

In NY K82882, CBP classified the subject sunshade under subheading 6306.99.0000, HTSUSA, which provides for "Tarpaulins, awnings and sunblinds; tents; sails for boats, sailboards or landcraft; camping goods: Other: Of other textile materials."

ISSUE:

What is the proper classification of the subject sunshade under the HTSUSA?

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

The EN to heading 6306 state that the heading covers "a range of textile articles usually made from strong, close woven canvas" including, in pertinent part:

> (3) **Awnings, sunblinds** (for shops, cafes, etc.) These are designed for protection against the sun; they are generally made of strong plain or striped canvas, and may be mounted on roller or folding mechanisms. They remain classified in this heading even when provided with frames, as is sometimes the case with sunblinds.

In prior rulings, we have noted that sunblinds are "covers for windows on buildings." *See* HQ 088040, dated January 16, 1991. In regard to the articles included under heading 6306, we have stated, ". . . those articles are designed to mount over doors and windows to provide shelter and protection against the sun to those entering a building or using a window. *See* HQ 087562, dated August 15, 1990.

We find that the subject sunshade constitutes a sunblind. The subject sunshade's purpose, as a sunblind's, is to protect against the sun. It will principally be used on windows, being mounted on the outside of a house to reduce the sun's damaging effects on the interior of the house. The fact that the instant sunshade comes with its own mounting brackets indicates that it is designed to remain attached to a structure and not be portable, unlike the sun and wind shields that are classified under heading 6307, HTSUSA (*See e.g.*, NY 866112, dated September 5, 1991 and NY I89631, dated January 6, 2003). Additionally, this office has researched goods of the class or kind to which the instant sunshade belongs, and found that several companies are marketing and selling goods substantially similar to the subject sunshade as sunblinds.

HOLDING:

NY K82882, dated February 20, 2004, is hereby revoked.

The subject sunshade is classified under subheading 6306.12.0000, HTSUSA, which provides for "Tarpaulins, awnings and sunblinds; tents; sails for boats, sailboards or landcraft; camping goods: Tarpaulins, awnings and sunblinds: Of synthetic fibers." The applicable rate of duty under the

2004 HTSUSA is 8.8% percent *ad valorem* and the applicable quota category is 669.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest your client check, close to the time of shipment, the Textile Status Report for Absolute Quotas which is available now on the CBP website at www.cbp.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

19 CFR PART 177

MODIFICATION OF RULING LETTER AND TREATMENT RELATING TO THE COUNTRY OF ORIGIN MARKING REQUIREMENTS FOR ITALIAN-ORIGIN JEWELRY CHAINS AND CLASPS THAT ARE ASSEMBLED WITHIN THE UNITED STATES TO FORM FINISHED JEWELRY

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of modification of ruling letter and treatment relating to the country of origin marking requirements for Italian-origin jewelry chains and clasps that are assembled within the United States to form finished jewelry.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection ("CBP") is modifying one ruling letter and any treatment previously accorded by CBP to substantially identical transactions, concerning the country of origin marking requirements for Italian-origin jewelry chains and clasps that are assembled within the United States to form finished jewelry. Notice of the proposed action was published in the Customs Bulletin on April 21, 2004. No comments were received in response to the notice.

DATE: This action is effective August 22, 2004.

FOR FURTHER INFORMATION CONTACT: Edward Caldwell, Commercial Rulings Division (202) 572–8872.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts that emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the CBP and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the Customs Bulletin on April 21, 2004, proposing to modify a ruling letter relating to the country of origin marking requirements for Italian-origin jewelry chains and clasps that are assembled within the United States to form finished jewelry pieces. No comments were received in response to this notice.

As stated in the proposed notice, this modification will cover any rulings on similar merchandise that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on transactions similar to the one presented in this notice should have advised CBP during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP is modifying any treatment previously accorded by CBP to substan-

tially identical merchandise under the stated circumstances. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the relevant statutes. Any person involved with substantially identical merchandise or transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical merchandise or transactions or of a specific ruing not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY I85493 dated August 22, 2002, CBP determined in one of three scenarios presented that cutting Italian-origin jewelry chain to length and assembling the chain with an Italian-origin lobster clasp within the United States substantially transformed the foreign-origin chain and clasp into a product of the United States. However, upon reconsideration, CBP has determined that the processes performed in the United States are minor operations and that the essential character of the bracelet or necklace is the chain which is made in Italy. Therefore, it is now CBP's position that the country of origin of the jewelry in this scenario is Italy.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is modifying NY I85493 and any other rulings not specifically identified to reflect the proper country of origin marking requirements applicable to Italian-origin jewelry chains and clasps that are assembled within the United States to form finished jewelry pursuant to the analysis set forth in the attached ruling, HRL 562868. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is modifying any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

Dated: June 1, 2004

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 562868
June 1, 2004
MAR–2–05 RR:CR:SM 562868 EAC
CATEGORY: Marking

MS. SUSAN STUDENY
TIFFANY & CO.
15 Sylvan Way
Parsippany, NJ 07054–3893

RE: Country of origin marking requirements for jewelry comprised of Italian-origin chains and clasps; substantial transformation

DEAR MS. STUDENY:

Pursuant to your request of August 16, 2002, for a ruling pertaining to the tariff classification and country of origin marking requirements applicable to jewelry that is comprised of components of U.S. and Italian origin, the Director, U.S. Customs and Border Protection ("CBP") National Commodity Specialist Division, issued New York Ruling Letter ("NY") I85493 dated August 22, 2002, to your company. Upon further consideration of NY I85493, we have determined that, while the tariff classifications in that ruling are correct, the country of origin marking requirements set forth for jewelry assembled to completion within the United States from Italian-origin clasps and chains are incorrect. Therefore, NY I85493 is hereby modified for the reasons set forth below.

FACTS:

Three scenarios of production for jewelry were presented for consideration in NY I85493, in which CBP held that cutting jewelry chain to length and combining the chain with lobster clasps within the United States substantially transformed certain foreign-origin components into an article with a new name, character, and use. The first two scenarios involved assembling U.S.-origin chain with foreign-made clasps, while the third scenario involved joining foreign-origin chain with a foreign-made clasp. It was determined that the country of origin of the completed jewelry in all three scenarios was the United States. As it is our belief that the forgoing is correct with respect to the first and second production scenarios considered in that case, this ruling will only consider the facts of the third scenario.

Accordingly, in the third production scenario, Italian-origin sterling silver jewelry chains and Italian-origin sterling silver lobster clasps are assembled within the United States to form completed jewelry pieces. Each sterling silver chain weighs 52 grams and is valued at $14. Each sterling silver lobster clasp weighs 7.5 grams and is valued at $11. The assembled jewelry pieces will be finished subsequent to assembly.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NY I85493, as

described below, was published in the Customs Bulletin on April 21, 2004. No comments were received in response to the notice.

ISSUE:

For marking purposes, what is the country of origin of the jewelry assembled within the United States from the components described above?

LAW AND ANALYSIS:

Section 304 of the Tariff Act of 1930 (19 U.S.C. § 1304), provides that, unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. § 1304 was that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. "The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." United States v. Friedlander & Co., 27 C.C.P.A. 297 at 302 (1940).

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and the exceptions of 19 U.S.C. § 1304. Section 134.1(b), Customs Regulations (19 CFR 134.1(b)), defines "country of origin" as the country of manufacture, production or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of the marking laws and regulations. The case of U.S. v. Gibson-Thomsen Co., Inc., 27 C.C.P.A. 267 (C.A.D. 98)(1940), provides that an article used in manufacture which results in an article having a name, character, or use differing from that of the constituent article will be considered substantially transformed and, as a result, the manufacturer or processor will be considered the ultimate purchaser of the constituent materials. In such circumstances, the imported article is excepted from marking and only the outermost container is required to be marked. See, 19 CFR 134.35(a).

In Headquarters Ruling Letter ("HRL") 557100 dated April 30, 1993, raw Bolivian gold was converted into bars of pure gold within Bolivia by means of a melting process. Utilizing rolling mills and drawing machines, the bars were thereafter converted into gold wire that was wound around spools. The spooled gold wire was then exported to Italy where it was fed into machines and converted into gold chain. The gold chain was subsequently cleaned, prepared with soldering powder, passed through soldering ovens, and wound around spools. At this point, the gold chain was returned to Bolivia for further processing which included cutting the chain to length for necklaces and bracelets, manually soldering end tips to the chains, passing the chains through ovens for heat treatment, cleaning the chains with chemicals and ultrasonic processes, manually assembling locks to the chains, cleaning the assembled jewelry, "finishing" the gold chains with a brushing machine, testing the assembled jewelry for quality control compliance, and packing the jewelry for shipment to the United States.

At issue in HRL 557100 was whether, for purposes of eligibility under the Andean Trade Preference Act ("ATPA"), the jewelry imported into the United

States was considered to be a "product of" Bolivia. In deciding this issue, we initially noted that processing gold wire into gold chain substantially transforms the gold wire into a product of the country where processed into gold chain. Citing, HRL 555929 dated April 22, 1991. Therefore, as it was evident that the Bolivian gold wire was substantially transformed into a product of Italy when converted into gold chain, the remaining issue was whether the Italian-origin gold chain was subsequently substantially transformed back into a product of Bolivia when integrated into necklaces and bracelets.

Regarding whether cutting to length, soldering end tips, attaching locks or clasps, brushing, and inspecting the completed jewelry substantially transformed the Italian gold chain into a product of Bolivia, we held:

> It is our opinion that once the woven gold chain is returned to Bolivia, the processes performed there to create the finished necklaces and bracelets do not substantially transform the imported chain into a "product of" Bolivia. We believe that the essential character of the bracelet or necklace is the chain which results from cutting, formation of the links and weaving operations which occur in Italy.

See also, HRL 560333 dated July 24, 1997 (simple assembly or weaving of gold links into chain, even when coupled with a soldering operation, does not substantially transform the gold links).

As applied to the case presently under consideration, it is our opinion that merely combining an Italian-origin sterling silver chain with an Italian-origin sterling silver lobster clasp and finishing the resulting product does not substantially transform the items of foreign origin. Therefore, the country of origin of the jewelry produced in this manner is Italy.

HOLDING:

Based upon the information before us, we find that combining an Italian-origin sterling silver chain with an Italian-origin sterling silver lobster clasp within the United States to form completed jewelry does not substantially transform the foreign-origin items into a product of the United States. As such, the country of origin of completed jewelry pieces produced under these circumstances is Italy.

EFFECT ON OTHER RULINGS:

NY I85493 dated August 22, 2002, is hereby MODIFIED. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Slip Op. 04–59

ALLEGHENY BRADFORD CORPORATION, d/b/a TOP LINE PROCESS EQUIPMENT COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Court No. 02–00073

[Antidumping duty order scope determination reversed.]

Dated: June 4, 2004

Womble Carlyle Sandridge & Rice PLLC (*James K. Kearney*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*, *James H. Holl, III*, and *Paul D. Kovac*), *Philip J. Curtin*, Attorney, Office of Chief Counsel for Import Administration, United States Department of Commerce, *Christopher Chen*, Senior Attorney, Office of Chief Counsel, United States Bureau of Customs and Border Protection, of counsel, for defendant.

OPINION

RESTANI, Chief Judge:

INTRODUCTION

Plaintiff Allegheny Bradford Corporation, d/b/a Top Line Process Equipment Company ("Top Line") moves for judgment on the agency record that its stainless steel butt-weld tube fittings from Taiwan were improperly ruled to be within the scope of an antidumping duty order by the U.S. Department of Commerce ("Commerce" or "Department"). *Final Scope Ruling on the Antidumping Duty Order on Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Allegheny Bradford Corporation d/b/a Top Line Process Equipment* (Dep't Commerce Dec. 10, 2001), P.R. 29:13:33, Pl.'s App., Doc. 1, *notice published at* 66 Fed. Reg. 65,899 (Dep't Commerce Dec. 21, 2001) [hereinafter *Final Affirmative Scope Ruling*]. The underlying antidumping duty order imposed duties on stainless steel butt-weld pipe fittings from Taiwan. *Amended Final Determination and Antidump-*

ing Duty Order: Certain Welded Stainless Steel Butt-Weld Pipe Fittings from Taiwan, 58 Fed. Reg. 33,250 (Dep't Commerce June 16, 1993) [hereinafter *Antidumping Duty Order* or *Order*]. Because its tube fittings are unambiguously outside the scope of the *Antidumping Duty Order*, Top Line's motion is granted.

BACKGROUND

I. THE ANTIDUMPING DUTY INVESTIGATION

The *Antidumping Duty Order* was the culmination of an investigation initiated by the petition of the Flowline Division of Markovitz Enterprises. *Petition* (May 20, 1992), P.R. 1:3:14-18,[1] Pl.'s App., Doc. 3, Ex. 4 [hereinafter *Petition*]. The petition alleged unfair imports of stainless steel butt-weld pipe fittings with an inside diameter of under fourteen (14) inches from Taiwan and the Republic of Korea. *Petition*, at 1, P.R. 1:3:14, Pl.'s App., Doc. 3, Ex. 4 at 1. Over the course of several pages, the petition describes the subject merchandise as follows:

- classifiable under heading 7307.23 of the Harmonized Tariff Schedule;
- designated under heading A403/A403M–1991 of the standards developing organization, ASTM;
- having American National Standards Institute ("ANSI") dimensional specifications B16.9–1986 and B16.28–1986;
- including finished or unfinished fittings capable of meeting these specifications
- excluding "threaded, grooved, and bolted fittings;"
- "used to connect pipe sections in piping systems where conditions require welded connections, as distinguished from fittings designed for other fastening methods (e.g., threaded, grooved, or bolted fitting);"
- "used where one or more of the following conditions is a factor in designing the piping system: (1) corrosion of the piping system will occur if material other than stainless steel is used; (2) contamination of the material in the system by the system itself must be prevented; (3) high temperatures (in excess of 300° F) are present; (4) extreme low temperatures are present; (5) high pressures are contained within the system;"

---

[1] "P.R. ___ : ___ : ___ " refers to the public record document number, micro-fiche slide number, and micro-fiche frame number.

- "used in so-called 'process' piping systems such as chemical plants, foot processing facilities, breweries, cryogenic plants (including basic oxygen steel processing), waste treatment facilities, pulp and paper production facilities, gas processing (gas separation) facilities, and commercial nuclear power plants and nuclear navy applications (in reactor lines and water lines);"
- coming in "several basic shapes: 'elbows', 'tees', 'reducers', 'stub ends' and caps';"
- having edges that, for finished fittings, "are beveled so that when placed against the end of a pipe (the ends of which have also been beveled) a shallow channel is created to accommodate the 'bead' of the weld which joins the fittings to the pipe"

Id. at 1–4, Pl.'s App., Doc. 3, Ex. 4 at 1–4.

Working from Flowline's product description, Commerce formulated the antidumping investigation's scope in its notice of initiation:

> The products subject to these investigations are stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter.
>
> Stainless steel butt-weld pipe fittings are used to connect pipe sections in piping systems where conditions require welded connections. The subject merchandise is used where one or more of the following conditions is a factor in designing the piping system: (1) Corrosion of the piping system will occur if material other than stainless steel is used; (2) contamination of the material in the system by the system itself must be prevented; (3) high temperatures are present; (4) extreme low temperatures are present; (5) high pressures are contained within the system.
>
> Stainless steel butt-weld pipe fittings come in a variety of shapes, with the following five shapes the most basic: "elbows", "tees", "reducers", "stub ends", and "caps". The edges of finished fittings are beveled. Threaded, grooved, and bolted fittings are excluded from these investigations. The stainless steel butt-weld pipe fittings subject to these investigations are classifiable under subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States (HTSUS).

Initiation of Antidumping Duty Investigations: Certain Stainless Steel Butt-Weld Pipe Fittings from the Republic of Korea and Taiwan, 57 Fed. Reg. 26,645 (Dep't Commerce June 15, 1992) [hereinafter *Notice of Initiation of Investigation*]. When Commerce issued its preliminary determination roughly six months later, the scope lan-

guage underwent minor changes, which consisted primarily of the addition of the word "certain" in its reference to the pipe fittings:

> The products subject to *this* investigation are *certain* stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter.
>
> *Certain* stainless steel butt-weld pipe fittings (*pipe fittings*) are used to connect pipe sections in piping systems where conditions require welded connections. The subject merchandise is used where one or more of the following conditions is a factor in designing the piping system:
>
> (1) Corrosion of the piping system will occur if material other than stainless steel is used;
>
> (2) Contamination of the material in the system by the system itself must be prevented;
>
> (3) High temperatures are present;
>
> (4) Extreme low temperatures are present;
>
> (5) High pressures are contained within the system.
>
> ["*Stainless steel butt-weld*" deleted] Pipe fittings come in a variety of shapes, with the following five shapes being the most basic: "elbows", "tees", "reducers", "stub ends", and "caps". The edges of finished fittings are beveled. Threaded, grooved, and bolted fittings are excluded from these investigations. The pipe fittings subject to these investigations are classifiable under subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States (HTSUS).
>
> Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

Preliminary Determination of Sales at Less Than Fair Value: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan, 57 Fed. Reg. 61,047 (Dep't Commerce Dec. 23, 1992) [hereinafter *Preliminary Determination*] (emphasis added to show changes from *Notice of Initiation of Investigation*).

The *Final Determination* nearly duplicated the scope language of the *Preliminary Determination*, with the addition, however, of two paragraphs regarding A774 fittings:

> The products subject to this investigation are certain stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter.
>
> Certain *welded* stainless steel butt-weld pipe fittings (pipe fittings) are used to connect pipe sections in piping systems where

> conditions required welded connections. The subject merchandise is used where one or more of the following conditions is a factor in designing the piping system: (1) Corrosion of the piping system will occur if material other than stainless steel is used; (2) contamination of the material in the system by the system itself must be prevented; (3) high temperatures are present; (4) extreme low temperatures are present; (5) high pressures are contained within the system.
>
> Pipe fittings come in a variety of shapes, with the following five shapes the most basic: "elbows", "tees", "reducers", "stub ends", and "caps". The edges of finished pipe fittings are beveled. Threaded, grooved, and bolted fittings are excluded from these investigations. The pipe fittings subject to these investigations are classifiable under subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States (HTSUS).
>
> Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of these investigations is dispositive.
>
> *After it withdrew from this investigation, [Tachia Yung Ho Machine Co., Ltd.] inquired whether A774 type stainless steel pipe fittings were included within the scope of the investigation, and therefore, subject to any antidumping duty order.*
>
> *Based on the information on the record, we determine that A774 is covered by the scope of this investigation because it meets the requirements outlined in our scope. Our scope states that fittings must be under 14 seconds in inside diameter and can be either finished or unfinished. Our scope language only specifically excludes threaded, bolted and grooved fittings, and none of these criteria apply to A774 fittings. Therefore, we determine that A774 fittings are included in the scope of this investigation. (See "Concurrence Memorandum", dated May 7, 1993 for further discussion).*

Final Determination of Sales at Less than Fair Value: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan, 58 Fed. Reg. at 28,556 (Dep't Commerce May 14, 1993) [hereinafter *Final Determination*] (emphasis added to show changes from *Preliminary Determination*). The additional section regarding A774 fittings refers to the *Concurrence Memorandum*, which explains how the non-beveled A774 fittings could be included within the investigation's scope: "The scope does state the edges of finished fittings are beveled; however, this is not a requirement nor is this stated with respect to unfinished fittings. Finally, our scope language only specifically excludes threaded, bolted and grooved fittings, and none of these criteria apply to A774 fittings." *Concurrence Memorandum* to *Final Determina-*

tion (Dep't Commerce May 7, 1993) at issue 3, P.R. 1: 4:66–67, Pl.'s App., Doc. 3, Ex. 11 at 4 [hereinafter *Concurrence Memorandum*].

II. THE COMMISSION'S INJURY INVESTIGATION

Concurrent with Commerce's dumping investigation, the International Trade Commission ("ITC" or "Commission") instituted its injury investigation on December 17, 1992. In providing notice of the initiation of its injury investigation, the ITC gave only a brief description of the subject merchandise as "certain stainless steel butt-weld pipe fittings, provided for in subheading 7303.23.00 of the [HTSUS]." *Certain Stainless Steel Butt-Weld Pipe Fittings from Korea and Taiwan: Institution and Scheduling of Preliminary Antidumping Investigations*, 57 Fed. Reg. 22,486 (Int'l Trade Comm'n May 28, 1992). Later, on June 3, 1993, the ITC transmitted to Commerce its final affirmative determination that a U.S. industry was materially injured by less than fair value imports of stainless steel butt-weld pipe fittings from Taiwan. *Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, USITC Pub. 2641, Inv. No. 731-TA-564 (final) (June 1993) at *1 [hereinafter *Final Injury Determination*]. The *Final Injury Determination* defined the scope of the investigation by incorporating the Commission's product discussion in *Certain Stainless Steel Butt-Weld Pipe Fittings from Korea*, USITC Pub. 2601, Inv. No. 731-TA-563 (final) (Feb. 1993) [hereinafter *Korea Final Injury Determination*]. The product description in the *Korea Final Injury Determination* begins as follows:

> Stainless steel butt-weld pipe fittings are used to connect pipe sections where conditions require permanent, welded connections and resistance to corrosion or oxidation and extreme temperatures as well as the ability to withstand pressure. The beveled edges of butt-weld fittings distinguish them from other types of pipe fittings, such as threaded, grooved, or bolted fittings, which rely on different fastening methods. When placed against the end of a beveled pipe or another fitting, the beveled edges form a shallow channel that accommodates the "bead" of the weld that fastens the two adjoining pieces.

Id. at *27–*28.

III. THE ANTIDUMPING ORDER

After the ITC made its affirmative injury determination and Commerce issued the *Final Determination*, the Department issued the definitive scope language in the *Final Antidumping Order*. The *Order* altered the final paragraph of the *Final Determination* to couch the A774 ruling in the past tense and removed the reference to the Department's *Concurrence Memorandum*:

> The products subject to this investigation are certain stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter.
>
> Certain welded stainless steel butt-weld pipe fittings (pipe fittings) are used to connect pipe sections in piping systems where conditions *require* welded connections. The subject merchandise is used where one or more of the following conditions is a factor in designing the piping system: (1) Corrosion of the piping system will occur if material other than stainless steel is used; (2) contamination of the material in the system by the system itself must be prevented; (3) high temperatures are present; (4) extreme low temperatures are present; (5) high pressures are contained within the system.
>
> Pipe fittings come in a variety of shapes, with the following five shapes the most basic: "elbows", "tees", "reducers", "stub ends", and "caps". The edges of finished pipe fittings are beveled. Threaded, grooved, and bolted fittings are excluded from these investigations. The pipe fittings subject to these investigations are classifiable under subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States (HTSUS).
>
> Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of these investigations is dispositive.
>
> After it withdrew from this investigation, Tachia Yung Ho Machine Industry Co., Ltd. (TYH) inquired whether A774 type stainless steel pipe fittings were included within the scope of the investigation, and therefore, subject to any antidumping duty order.
>
> Based on the information on the record, we determin*ed in our final determination* that A774 is covered by the scope of this investigation because it meets the requirements outlined in our scope. Our scope states that fittings must be under 14" [*"seconds"* deleted] in inside diameter and can be either finished or unfinished. Our scope language only specifically excludes threaded, bolted and grooved fittings, and none of these criteria apply to A774 fittings. Therefore, we determined that A774 fittings are included in the scope of this investigation. ["(*See 'Concurrence memorandum', dated May 7, 1993 for further discussion*)." deleted]

Antidumping Duty Order, 58 Fed. Reg. at 33,250 (emphasis added to show changes from *Final Determination*).

IV. TOP LINE'S FIRST REQUEST FOR A SCOPE DETERMINATION

Top Line did not participate in the pre-antidumping order investigations by Commerce and the ITC, and did not participate in Commerce's administration of the *Final Antidumping Order*. Top Line did, however, approach Commerce on December 14, 1994, requesting a scope ruling as to whether its various stainless steel tube fittings with non-welded ends are covered by the *Final Antidumping Order*. *Letter from Reed Smith to Secretary of Commerce* (Dec. 14, 1994), P.R. 4:5:44, Pl.'s App., Doc. 4, Ex. 14 [hereinafter *First Scope Request*]. Commerce ruled for Top Line after an initial investigation, concluding that "no formal inquiry is warranted to determine whether bevel seat fittings, clamp fittings, valves, hangers, and flanges are outside the scope of [the *Final Antidumping Order*]." *Final Scope Ruling: Antidumping Duty Order on Stainless Steel Butt-Weld Pipe Fittings from Taiwan- Request of Top Line Process Equipment Corporation*, (Dep't Commerce Aug. 8, 1994), at 2, P.R. 1:4:76, Pl.'s Appx., Doc. 3, Ex. 12 at 2, *notice published at* 60 Fed. Reg. 54,213 (Dep't Commerce Oct. 20, 1995) [hereinafter *First Scope Ruling*].

V. TOP LINE'S SECOND SCOPE REQUEST

Several years after the *First Scope Ruling*, Top Line received from Customs a *Notice of Action*, dated March 8, 2001, informing the company that an entry of its "stainless steel butt weld pipe fittings" was subject to antidumping duties and requesting a cash deposit on the entry within 30 days. *Notice of Action* (Mar. 8, 2001), P.R. 1:3:11, Pl.'s App., Doc. 3, Ex. 3. Top Line responded the following month by filing with Commerce a second scope request, which sought a ruling as to whether the *Antidumping Duty Order* covers its sanitary/hygienic stainless steel butt-weld tube fittings imported from King Lai International Co., Ltd. ("King Lai") of Taiwan. *Letter from Reed Smith to Secretary of Commerce* (Apr. 12, 2001), at 1, P.R. 1:2:1, Pl.'s App., Doc. 3 [hereinafter *Second Scope Request*].[2]

In the *Second Scope Request*, Top Line alleged that its sanitary/hygienic stainless steel butt-weld tube fittings should be excluded from the *Final Antidumping Order* because: (1) while stainless steel pipe, the subject of the *Final Antidumping Order*, is always designated by inside diameter, stainless steel tubing, King Lai's product, is always designated by outside diameter; (2) King Lai's sanitary/hygienic stainless steel butt-weld tube fittings do not meet the specific and objective criteria for stainless steel butt-weld pipe fittings,

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[2] On July 31, 2000, Commerce, pursuant to 19 U.S.C. § 1675, initiated an administrative review of the *Final Antidumping Order*, covering the period from June 1, 1999 to May 31, 2000. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 65 Fed. Reg. 46,687, 46,688 (Dep't Commerce July 31, 2000).

as set forth in the *Petition*; (3) King Lai's tube fittings are manufactured and used in different ways than the pipe fittings described in the *Final Antidumping Order*; and (4) King Lai's sanitary/hygienic stainless steel butt-weld tube fittings are square cut, not beveled. *Second Scope Request*, at 5–6, Pl.'s App., Doc. 3 at 5–6.

Responding to the *Second Scope Request*, a group of manufacturers—including Flowline, Gerlin, Inc., Shaw Alloy Piping Products, Inc., and Taylor Forge Stainless, Inc. ("Petitioners")—urged Commerce to find Top Line's tube fittings to be covered by the *Order*. *Letter from Collier Shannon Scott to the Secretary of Commerce* (May 4, 2001), at 1–2, P.R. 2:5:1, Def.'s App. at 71–72 [Hereinafter *Collier Shannon Letter* (May 4, 2001)]. Petitioners argued that Top Line's *Second Scope Request* failed to distinguish its tube fittings from the subject butt-weld pipe fittings. *Id.* at 2, Def.'s App. at 72. Petitioners also emphasized a purported admission by Top Line in its first scope proceeding that its butt-weld fittings were covered by the *Order*. *Id.* at 3–4, Def.'s App. at 73–74.[3]

In response to a supplemental questionnaire from Commerce, Top Line specified the parameters of its scope request and discussed the points raised by Petitioners. *See Letter from Reed Smith to Secretary of Commerce* (May 11, 2001), P.R. 4:5:35, Pl.'s App., Doc. 4. This letter reemphasized the purported physical differences between tube and pipe. *Id.* at 2–4, Pl.'s App., Doc. 4 at 2–4. Shortly thereafter, Top Line submitted samples of two types of sanitary/hygienic stainless steel butt-weld tube fittings for review by Commerce. *Letter from Reed Smith to Secretary of Commerce* (May 18, 2001), P.R. 5:5:66, Pl.'s App., Doc. 5.

Commerce found the parties' submissions and the existing agency work to be an insufficient basis for decision and, consequently, determined that a formal scope inquiry was required under C.F.R. §§ 351.225(d) and (k)(1). *Letter from Edward C. Yang to All Interested Parties*, (Dep't Commerce May 24, 2001), at 1–2, P.R. 9:5:78, Def.'s Appx. at 86–87 [hereinafter *Formal Scope Initiation Letter*]. In commencing the formal scope inquiry, Commerce requested that interested parties submit comments regarding their products that ad-

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[3] In a footnote to the *First Scope Ruling*, Commerce observed that "Top Line acknowledges that it does market a line of butt-weld tube fittings, such as elbows, tees, and reducers that do fall under the scope of the order. However, Top Line states that it does not import these products into the United States." *First Scope Ruling*, at 5 n.1, Pl.'s App., Doc. 3, Ex. 12 at 5. The footnote does not provide a citation for the alleged acknowledgment. Top Line argues that this purported acknowledgment was actually a mischaracterization of a statement that only admitted that the company marketed a line of butt-weld tube fittings, not that those tube fittings fell within the scope of the *Order*. Pl.'s Reply Br. at 3 (citing *See Letter from Reed Smith* (May 11, 2001), at 2–3, P.R. 4:5:35, Pl.'s App., Doc. 4, at 2–3). In any event, Commerce refined its interpretation of this purported admission, and used it "as support only for its conclusion that the information on the record prior to the initiation of the formal scope inquiry did not offer a clear distinction between pipe and tube butt-weld fittings." *Final Affirmative Scope Ruling*, at 4–5, P.R. 29:13:33, Pl.'s App., Doc. 1, at 4–5.

dress the five criteria originally set forth in *Diversified Products Corp. v. United States*, 6 CIT 155, 572 F. Supp. 883 (1983), and incorporated into regulation by 19 C.F.R. § 351.225 (k)(2) (2003): (1) the physical characteristics of the product; (2) the ultimate use of the product; (3) the expectations of the ultimate purchaser; (4) the channels of trade in which the product is sold; and (5) the manner in which the product is advertised and displayed. *Id.* at 2, Def.'s Appx. at 87.

In response to the *Formal Scope Initiation Letter*, Top Line and Petitioners submitted comments discussing the *Diversified Products Criteria* on June 12, 2001. *Letter from Reed Smith to Secretary of Commerce*, (June 12, 2001), P.R. 11:7:1, Pl.'s App., Doc. 7 [hereinafter *Top Line Scope Comments*]; *Letter from Collier Shannon to Secretary of Commerce* (June 12, 2001), P.R. 10:6:1, Def.'s App. at 101.[4]

In discussing the first criteria—physical characteristics—Top Line argued that " 'pipe' and 'tube or tubing' are precise terms describing different products." *Top Line Scope Comments*, at 2, Pl.'s App., Doc. 7, at 2. In support of this claim, Top Line alleged that, in contrast to pipe fittings, tube fittings have square cut (i.e. non-beveled) ends; are designated by its outside diameter rather than its inside diameter; and have their wall thickness identified by the term "gauge" as opposed to the term "schedule," which is used for pipe fittings. *Id.* at 7, Pl.'s App., Doc. 7, at 7.

Second, regarding the ultimate use of the product, Top Line claimed that tube fittings are to be used in applications involving sanitary processing of consumable products, or manufacturing of products requiring extreme purity. *Id.* at 8, Pl.'s App., Doc. 7, at 8. Top Line contrasted these applications with those of pipe fittings, which it described as almost exclusively industrial applications that do not require sanitary or hygienic conditions. *Id.* at 8-9, Pl.'s App., Doc. 7, at 8–9. Top Line also asserted that "pipe is generally intended for high temperature and high pressure applications [while] tube fittings are not used when either extremely high or low temperatures are present, nor are they used in 'high pressure' applications." *Id.* at 9, Pl.'s App., Doc. 7, at 9.

As for the third criteria—the expectations of the ultimate purchaser—Top Line argued that because its tube fittings are not used in the same applications as pipe fittings, the expectations of the ultimate purchaser of sanitary/hygienic stainless steel butt-weld tube fittings are different from that of the ultimate purchaser of pipe fittings. *Id.*

Top Line then discussed the fourth criteria, channels of trade, stating that, "to the best of [its] knowledge and belief," King Lai is

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[4] On June 22, 2001, Top Line and Petitioners submitted rebuttal comments. *Letter from Reed Smith to Secretary of Commerce* (June 22, 2001), P.R. 13:9:1, Pl.'s App., Doc. 8; *Letter from Collier Shannon to Secretary of Commerce* (June 22, 2001), P.R. 12:8:44.

not a supplier of pipe fittings. *Id.* at 9–10, Pl.'s App., Doc. 7, at 9–10. Top Line also indicated that the *Petition* did not identify Top Line as a U.S. distributer of pipe fittings, nor was Top Line's proposed port of import, Pittsburgh, listed by Petitioners as a port of import for pipe fittings. *Id.* at 10, Pl.'s App., Doc. 7, at 10.

Regarding the fifth criteria, the manner of advertising and display, Top Line argued that it is a member of certain industry associations that "define the potential end-users of stainless steel butt-weld tube fittings useable in sanitary and hygienic applications." *Id.* at 11, Pl.'s App., Doc. 7, at 11. Top Line also noted that it advertises in particular trade journals, such as *Pharmaceutical Processing* and *Food Manufacturing*, whereas Petitioners and other domestic producers of stainless steel butt-weld pipe fittings do not. *Id.*

At the conclusion of the comment period, Commerce made a preliminary determination that Top Line's sanitary/hygienic stainless steel butt-weld tube fittings are within the scope of the *Final Antidumping Order. Memorandum from Edward C. Yang to Joseph A. Spetrini: Preliminary Scope Ruling on the Antidumping Duty Order on Stainless Steel Butt-Weld Pipe Fittings: Allegheny Bradford Corporation d/b/a Top Line Process Equipment* (Dep't Commerce Nov. 15, 2001), P.R. 22:12:65, Pl.'s App., Doc. 2, at 2 [hereinafter *Preliminary Scope Ruling*]. In the *Preliminary Scope Ruling*, Commerce addressed the regulatory factors to be applied in the case of ambiguous orders. The Department then gave Top Line and Petitioners an opportunity to comment. Top Line and Petitioners responded by filing comment briefs, followed by rebuttal briefs. *Letter from Reed Smith to Secretary of Commerce*, (Nov. 21, 2001), P.R. 25:13:4, Pl.'s App., Doc. 11; *Letter from Collier Shannon Scott to Secretary of Commerce*, (Nov. 21, 2001), P.R. 26:13:17., Def.'s App. at 169; *Letter from Reed Smith to Secretary of Commerce*, (Nov. 26, 2001), P.R. 28:13:30, Def.'s App. at 171; *Letter from Collier Shannon Scott to Secretary of Commerce*, (Nov. 26, 2001), P.R. 27:13:21, Def.'s App. at 173.

On December 10, 2001, Commerce issued the *Final Affirmative Scope Ruling*, which found Top Line's tube fittings to be within the scope of the *Final Antidumping Order. Final Affirmative Scope Ruling*, Pl.'s App., Doc. 1. The *Final Affirmative Scope Ruling* reiterated that the scope could not be determined through informal inquiry and then applied each of the *Diversified Products* criteria.

First, regarding the physical characteristics of pipes and tubes, Commerce reaffirmed its preliminary determination that "the interchangeability of [the terms "pipe" and "tube"] precludes a finding of a distinction, based on terms alone." *Final Affirmative Scope Ruling*, at 9, Pl.'s App., Doc. 1, at 9.[5] Commerce then sought to clarify certain

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[5] Petitioners argued to Commerce that certain fittings—unfinished fittings, A774 fittings and those with Schedule 5S wall thickness—were clearly covered by the *Order* even though they had square-cut, non-beveled edges like Top Line's fittings. *Letter from Collier Shannon*

points from industry publications, which it had considered when analyzing Top Line's product in the *Preliminary Scope Ruling*. For instance, Commerce pointed out that statements contained in an article from *Fabricator*, a trade journal, rebutted Top Line's arguments regarding differences in the diameter, thickness, technical composition, and mechanical properties of stainless steel pipe fittings versus stainless steel tube fittings. *Final Affirmative Scope Ruling*, at 10-11, Pl.'s App., Doc. 1, at 10–11.

Regarding the ultimate use of the product, Commerce defended the validity of determining ultimate uses in part by the ultimate users of the product. *Id.* at 13, Pl.'s App., Doc. 1, at 13. Commerce then rejected Top Line's contention that a sanitary/hygienic tube fitting—as opposed to a pipe fitting—is always used for conveying food, beverage, and pharmaceutical products. *Id.* at 13, Pl.'s App., Doc. 1, at 13. The Department supported this position by citing Top Line's admission that pipe fittings may be used for "dirty" applications in any kind of manufacturing facility, including those in the dairy, food, beverage, and pharmaceutical process industries. *Id.* at 13, Pl.'s App., Doc. 1, at 13 (citing *Letter from Reed Smith* (May 11, 2001), at 3, Pl.'s App., Doc. 4, at 3). On this basis, Commerce concluded that the uses for tube and pipe fittings overlap. *Id.* Commerce explained the significance of this overlap by referring to its 1993 ruling on A774 pipe fittings. According to Commerce, the A774 ruling demonstrated that "meeting one or more of several factors [listed in the scope section of the *Order*] will cause a product to fall within the scope of the [*Order*]." *Final Affirmative Scope Ruling*, at 13–14, Pl.'s App., Doc. 1, at 13–14.

In terms of the expectations of the ultimate purchaser, Commerce reasoned that, because Top Line and Petitioners share common distributers, the record indicates "that pipe and tube fittings are being sold to the same ultimate customer." *Id.* at 16, Pl.'s App., Doc. 1, at 16. According to Commerce, the expectations of the ultimate purchasers of tube fittings are similar to the expectations of the ultimate purchasers of pipe fittings because the products have similar uses, applications, channels of trade, and manners of advertising and display. *Id.*

Regarding channels of trade, Commerce observed that Top Line did not contest the fact that it shares common distributors with Petitioners, who sell stainless steel butt-weld pipe fittings. *Id.* at 17, Pl.'s App., Doc. 1, at 17. Commerce used this commonality to support its determination that Top Line's tube fittings are within the scope of the *Order*. *Final Affirmative Scope Ruling*, at 17, Pl.'s App., Doc. 1, at 17.

(June 12, 2001), at 4, Def.'s App. at 104. Commerce, however, did not specifically discuss edging in stating its final position on physical characteristics. *Final Affirmative Scope Ruling*, at 9–11, Pl.'s App., Doc. 1, at 9–11.

Commerce analyzed the manner of advertising and display as the last step in its inquiry. The Department agreed with Top Line that its tube fittings were sold on separate product lists, in separate sections of catalogues, and on separate segments of websites, but discounted these considerations on the ground that Top Line's marketing choices are not probative of industry-wide marketing practices. *Id.* at 19, Pl.'s App., Doc. 1, at 19. Commerce then determined that Top Line's tube fittings are not distinguished from the subject merchandise by their method of advertising and display because Top Line uses different terminology than does King Lai, its Taiwanese producer, to describe the same fittings. *Id.*

Top Line filed suit with the court in January 2002. On June 17, 2002, the Company moved for a judgment on the agency record on the grounds that the *Final Affirmative Scope Ruling* is "unsupported by substantial evidence on the record and otherwise not in accordance with law." Pl.'s Op. Br. at 1. Oral argument on the motion was held on April 6, 2004. The court has jurisdiction over this motion pursuant to 28 U.S.C. § 1581(c) (2000).

DISCUSSION

The issue in this case is whether Commerce may construe an antidumping order to cover products which bear a characteristic that cannot be reconciled with the language of the order. The *Antidumping Duty Order*, in language very similar or identical to the *Petition*, *Preliminary Determination*, and *Final Determination* before it, stipulates that "[t]he edges of finished pipe fittings are beveled." *Antidumping Duty Order*, 58 Fed. Reg. at 33,250. Top Line's tube fittings, whether finished or unfinished, are *not* beveled. *Second Scope Request*, at 6, Pl.'s App., Doc. 3, at 6.

I. Standard of Review

The court must sustain Commerce's scope determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (2000); *see also Novosteel SA v. United States*, 128 F. Supp. 2d 720, 724–725 (Ct. Int'l Trade 2001). The court gives significant deference to Commerce's interpretation of its own orders, but a scope determination is not in accordance with the law if it changes the scope of an order or interprets an order in a manner contrary to the order's terms. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1094–95 (Fed. Cir. 2002) (quoting *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001)).

II. Applicable Law

In determining whether a product is within the scope of an antidumping duty order, Commerce is governed by a two-step process set forth in 19 C.F.R. § 351.225(k) (2003). First, § 351.225(k)(1) re-

quires that Commerce make its determination by taking into account "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). If those criteria are not dispositive, Commerce then evaluates the product according to the *Diversified Products* factors; namely "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2).

The introductory paragraph of § 351.225 explains that the interpretive rules for scope determinations are necessary to resolve issues that arise because "the descriptions of subject merchandise contained in the Department's determinations must be written in general terms." *See* 19 C.F.R. § 351.225(a). Indeed, a common issue in scope cases is whether Commerce acted properly in determining that a particular product is covered by an order's general terminology. *See, e.g.*, *Novosteel SA v. United States*, 284 F.3d 1261, 1264 (Fed. Cir. 2002) (rejecting plaintiff's argument that the antidumping and countervailing duty orders required more specific language); *Wirth Ltd. v. United States*, 22 CIT 285, 294, 5 F. Supp. 2d 968, 976 (1998) (noting that "[the] absence of a reference to a particular product in the Petition does not necessarily indicate that the product is not subject to an order").

It is important to distinguish such cases from circumstances in which an order's relevant terms are unambiguous. The language of an order is the "cornerstone" of a court's analysis of an order's scope. See Duferco, 296 F.3d at 1097–98 (citing Eckstrom, 254 F.3d at 1073). Commerce need only meet a low threshold to show that it justifiably found an ambiguity in scope language, see Novosteel, 284 F.3d at 1272, but it is not justifiable to identify an ambiguity where none exists. As noted above, Commerce cannot make a scope determination that conflicts with an order's terms, nor can it interpret an order in a way that changes the order's scope. *Duferco*, 296 F.3d at 1087, 1094–95 (quoting *Ericsson GE Mobile Communications v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995)).[6] Here, Commerce "interpreted" the *Order* in a manner contrary to its terms. Commerce maintains that beveled edges are not necessary for inclusion in the Order, despite what the Order says.

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[6] Even if a potential interpretation is not clearly precluded by an order's terms, the interpretation must nevertheless constitute a reasonable construction of those terms: "Scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco*, 296 F.3d at 1089; *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990) (holding that Commerce cannot construe its scope orders to include products that are outside those orders).

III. THE ANTIDUMPING DUTY ORDER

The *Antidumping Duty Order's* scope description begins by providing that "[t]he products subject to this investigation are certain stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter." 58 Fed. Reg. at 33,250. The remainder of the scope section specifies primarily the potential applications and shapes of the subject merchandise. This language makes it clear that the *Order* does not apply to *all* stainless steel butt-weld pipe fittings with an inside diameter under 14 inches, but rather a subset of such fittings. *See Eckstrom*, 254 F.3d at 1073 (rejecting a construction of the *Antidumping Duty Order* which would cover any stainless steel butt-weld pipe fittings under the 14 inch diameter limit). Among the sentences describing the subset of fittings covered by the *Order* is the following: "The edges of finished pipe fittings are beveled." 58 Fed. Reg. at 33,250.

Although the *Order's* beveling language is not subject to interpretation in this context—i.e., because a given fitting either does or does not have beveled edges—a review of the *Petition* and the investigation documents confirms that the beveling language is not an aberration that inadvertently found its way into the *Order*.[7] Indeed, the beveling requirement has been a consistent feature of the investigation's scope since it appeared in the *Petition*:

> A characteristic of all stainless steel butt-weld pipe fittings is that the edges of finished fittings are beveled so that when placed against the end of a pipe (the ends of which have also been beveled) a shallow channel is created to accommodate the 'bead' of the weld which joins the fittings to the pipe.

Petition, at 4, Pl.'s App., Doc. 3, Ex. 4, at 4.[8] After its appearance in the *Petition*, the beveling requirement appeared in each of Commerce's pronouncements as it proceeded with the investigation. With Commerce's notice that it was initiating an investigation—its first opportunity to publicize the scope—it stated in the scope section that "[t]he edges of finished fittings are beveled." *Notice of Initiation of Investigation*, 57 Fed. Reg. at 26,645. The same exact sentence appears in the scope section of the *Preliminary Determination*. 57 Fed. Reg. at 61,047. After the interested parties commented on the *Preliminary Determination*, Commerce made two pertinent changes to the scope language with the issuance of the *Final Determination*.

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[7] A review of the petition and investigation may assist the interpretation of an order, but "they cannot substitute for language in the order itself . . . a predicate for the interpretive process is language in the order that is subject to interpretation." *Duferco*, 296 F.3d at 1097.

[8] The court can only assume that this language was included as part of the requirements for a petition. "Petitions must contain (among other things) a 'detailed description of the subject merchandise that defines the requested scope of the investigation.' " *Novosteel*, 284 F.3d at 1271 (quoting 19 C.F.R. 351.202(b)(5)).

First, the beveling sentence was changed to refer to "pipe fittings" instead of simply "fittings." *Final Determination*, 58 Fed. Reg. at 28,556. Second, the scope section of the *Final Determination* contained two additional paragraphs setting forth Commerce's determination that pipe fittings conforming to specification A774 are covered by the scope. *Id.* While the *Final Determination* does not state that A774 fittings do not have beveled edges, it makes parenthetical reference to the *Concurrence Memorandum*, which does so. *Concurrence Memorandum*, at issue 3, Pl.'s App., Doc. 3, Ex. 11 at 4. Despite the reference to A774 fittings, the *Final Determination* retained the scope language describing the subject merchandise as having beveled edges. The beveled edge stipulation was again repeated in the *Order*, which removed the parenthetical reference to the *Concurrence Memorandum*. 58 Fed. Reg. at 33,250.

The ITC also characterized the subject merchandise as having beveled edges.[9] The *Final Injury Determination* incorporated by reference the product description set forth in the *Korea Final Injury Determination*. *Final Injury Determination*, USITC Pub. 2641 at *1. The second and third sentences of that product description discuss beveling as a distinguishing feature of the subject merchandise:

> The beveled edges of butt-weld fittings distinguish them from other types of pipe fittings, such as threaded, grooved, or bolted fittings, which rely on different fastening methods. When placed against the end of a beveled pipe or another fitting, the beveled edges form a shallow channel that accommodates the "bead" of the weld that fastens the two adjoining pieces.

Korea Final Injury Determination, USITC Pub. 2601 at *27–*28.

Despite the consistent use of beveled edges to help define the scope in the *Order* and other relevant documents, Commerce applied the § 351.225(k) criteria in the instant proceeding as if the *Order's* scope consisted of general terms that required significant interpretation. Such efforts were unnecessary. Any potential ambiguities in this case—for example, the distinction between pipe and tube fittings—are rendered moot by the irreconcilability of the *Order's* beveling sentence with the edging characteristics of Top Line's fittings. There is nothing more to interpret: the plain language of the *Order* does not encompass Top Line's non-beveled fittings.

This conclusion results from the *Order's* use of unequivocal language to describe the edges of the subject merchandise. The *Order* does not provide that the edges of finished pipe fittings "may be" or "are generally" beveled; either the edges are beveled or the fitting is not covered. This either/or proposition must be addressed before

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[9] As an antidumping order cannot be issued without affirmative determinations of both the ITC and Commerce, it is important that the same type of merchandise be investigated by both agencies.

reaching the second stage of the interpretive process. While application of the Diversified Products criteria is appropriate in a case such as Novosteel, where the plaintiff could not identify "any language in any of the sources (the petitions and the initial determinations by Commerce and the ITC) used to initially construe those Orders that would exclude its . . . product," 284 F.3d at 1270, the opposite is true here. In the *Petition*, the *Notice of Initiation of Investigation*, and the *Preliminary Determination*, and as well as in the *Final Determination* and the *Order*, the scope description includes a sentence requiring beveled edges, a sentence that cannot logically be construed to describe Top Line's fittings.

Beveling is not the only characteristic which can be ascertained without extensive inquiry and which the *Order*, by the logic of its language, requires for inclusion within its scope. For example, the scope section begins by describing the subject merchandise as certain fittings which are "under 14 inches inside diameter." *Antidumping Duty Order*, 58 Fed. Reg. at 33,250. It is elementary to determine which fittings have an inside diameter under 14 inches and which do not. There is also no doubt that the *Order* does not cover fittings with inside diameters of greater than 14 inches. This conclusion is inescapable, even though the *Order* does not affirmatively and explicitly exclude such fittings.

In contrast to characteristics that can be clearly ascertained and which the *Order* requires of subject merchandise in unequivocal language, other aspects of the scope description leave room for interpretation. The second paragraph of the *Order's* scope section provides that "[t]he subject merchandise is used where one or more of the following conditions is a factor in designing the piping system," and then lists five conditions, such as the presence of high temperatures. *Id.*, 58 Fed. Reg. at 33,250. Through the use of the phrase "one or more," the *Order* gives Commerce a certain amount of room to interpret whether a product may be included within the scope, based on the number and type of conditions the product fulfills. *See Eckstrom*, 254 F.3d at 1072–73 (discussing the significance of the *Order's* specification that subject merchandise meet "one or more" of the five conditions of use).

The *Order* also describes the possible shapes of the subject fittings in general terms: "Pipe fittings come in a variety of shapes with the following five shapes the most basic: 'elbows', 'tees', 'reducers', 'stub ends', and 'caps'." 58 Fed. Reg. at 33,250. The *Order* does not require that the subject merchandise conform to a particular shape or group of shapes. Again, this terminology allows Commerce room to interpret whether a given product bears a shape that is covered by the scope.

The contrast between these general terms and the beveled edge language is clear. While the *Order's* language allows for Commerce to make an affirmative scope determination on a fitting that is not

used where high temperatures are a factor in designing the piping system and where the fitting does not bear an "elbow" shape, it does not permit Commerce to include fittings that do not have beveled edges. Commerce is bound by "the general requirement of defining the scope of antidumping and countervailing duty orders by the actual language of the orders." *See Duferco*, 296 F.3d at 1098. An order cannot be interpreted broadly when a broad construction is "belied by the terms of the Order itself." *Id.* (quoting *Eckstrom*, 254 F.3d at 1073). The only exception to this rule occurs in certain situations where Congress, out of concern that orders might be circumvented, provided Commerce with discretion to make clarifications that would otherwise conflict with an order's literal scope. *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998) (discussing 19 U.S.C. § 1677j(d)). A circumvention determination is not at issue here. In the remaining areas of scope determinations, "Congress intended the language of the orders to govern." *Duferco*, 296 F.3d at 1098.[10]

IV. COMMERCE'S PRIOR INCLUSION OF NON-BEVELED A774 FITTINGS

Perhaps because it cannot otherwise avoid the *Order's* beveling language, the Government relies entirely on the fact that Commerce included non-beveled A774 fittings in the *Final Determination*: "Commerce's ruling upon A774 fittings shows that beveling is not an absolute requirement for a product to fall within the scope of the order." Def.'s Br. at 26. This argument presumes that the *Concurrence Memorandum's* A774 ruling carries the weight of precedential authority. The ruling does not deserve such treatment in this case: it was made at a late stage in the investigation and in irregular fashion; was reached without a thorough inquiry; and was based on unpersuasive reasoning.[11]

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[10] The force of an order's plain language is so great that, where the order's language is clearly inapplicable to a plaintiff's product, the imposition of duties on such a product constitutes a mere ministerial error that may be protested to Customs instead of Commerce. *See Xerox Corp. v. United States*, 289 F.3d 792, 795 (Fed. Cir. 2002) (finding plaintiff's belts to be clearly outside the scope of an order pertaining to belts used for power transmission because they were not used for power transmission and were not constructed with the materials listed in the order).

[11] In this case, some tension exists between Commerce's duty to abide by the language of its orders and the inclusion of non-beveled A774 fittings in the *Final Determination*, which references the *Concurrence Memorandum*. "Commerce must either act in accord with its prior, similar scope determinations or else provide 'rational reasons for deviating' from them." *Novosteel*, 284 F.3d at 1271 (discussing this Court's holding in *Springwater Cookie & Confections, Inc. v. United States*, 20 CIT 1192, 1196 (1996)). Commerce suggests that one brief, ill-reasoned section of the *Concurrence Memorandum* should prevail over its duty to abide by the clear language of its order. To demonstrate the error of this approach, it is necessary to examine the flaws of the A774 ruling, even though it is not before the court.

A. The Lateness and Irregularity of the A774 Ruling

By including a product that cannot be reconciled with the omnipresent beveling language, the A774 ruling purports to amend the investigation's scope concurrent with the issuance of the *Final Determination*, a very late stage in the investigation. "Commerce retains broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition." *Mitsubishi Heavy Indus., Ltd. v. United States*, 21 CIT 1227, 1232, 986 F. Supp. 1428, 1433 (1997) (quoting *Minebea Co. v. United States*, 16 CIT 20, 22, 782 F. Supp. 117, 120 (1992)); *but see Royal Bus. Mach., Inc. v. United States*, 1 CIT 80, 87, 507 F. Supp. 1007, 1014 (1980) (discussing the constraints of prior administrative action: "Each stage of the statutory proceeding maintains the scope passed on from the previous stage"). There is no clear point during the course of an antidumping investigation at which Commerce loses the ability to adjust the scope, but Commerce's discretion to define and clarify the scope of an investigation is limited in part by concerns for the finality of administrative action, which caution against including a product that was understood to be excluded at the time the investigation began. *Mitsubishi*, 21 CIT at 1231-32, 986 F. Supp. at 1433.

The inclusion of A774 fittings raises concerns for the finality and regularity of administrative action because it occurred late in the investigation; i.e., after completion of the ITC investigation and concurrent with the issuance of the *Final Scope Determination*. In *Mitsubishi*, the Court affirmed Commerce's scope determination in part because the clarification occurred early in the process (upon the issuance of the notice of investigation), thereby alleviating concerns of administrative finality and regularity. The ruling in *Mitsubishi* also demonstrated that, at some point, Commerce may, if it sees fit, delete some language from the petition's description of the subject merchandise in order to "further clarify" the scope of the investigation.[12] *Id.*, 21 CIT at 1232, 986 F. Supp. at 1430.

Because Commerce in the instant case ruled on non-beveled A774 fittings at a much later stage than the change in *Mitsubishi*—i.e., concurrent with the issuance of the *Final Determination*—it could not have removed the beveling sentence from the scope language without compromising the integrity of the investigation's prior stages. If, however, Commerce felt that it was too late to "clarify" the scope by deleting the beveling language, it should have declined to

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[12] At issue in that case was the definition of "unassembled components," and Commerce's clarification of that term was upheld in part because Commerce had not consistently interpreted "unassembled" and "incomplete" as two mutually exclusive terms. *Id.*, 21 CIT at 1232, 986 F. Supp. at 1434. The Court refrained from deciding whether Commerce may contract the scope of an investigation, however. *Id.*, 21 CIT at 1230 n.6, 986 F. Supp. at 1432 n.6.

include the A774 fittings, which were outside the plain language of the *Order*. Instead of pursuing an approach that would ensure the integrity and coherence of the scope language, Commerce included A774 fittings without removing the sentence requiring beveled edges. Commerce now proposes that the collateral effect of the A774 ruling is to nullify the beveling language, even while the language remains in the *Order*. Commerce cites no statute or regulation authorizing it to clarify or amend an investigation's scope by collateral nullification. Such an irregular maneuver does not merit judicial endorsement as a valid administrative precedent, especially considering the serious finality concerns it raises.

B. The Lack of a Thorough Inquiry

The precedential value of the A774 ruling is undermined not only by its timing and irregularity, but also by the consideration that the ruling was not the outcome of a standard, thorough scope determination process. Commerce's general obligation to follow "prior, similar scope determinations," *Novosteel*, 284 F.3d at 1271, is premised in part on the fact that the prior decisions are indeed determinations, with formal procedures to ensure reliable results. *See Springwater Cookie*, 20 CIT at 1195 (requiring Commerce to abide by prior final scope determinations or provide rational reasons for deviating from them). Unlike the extensive procedures that governed Commerce's response to Top Line's scope requests, the A774 ruling came in response to an inquiry that was submitted during the comment period that followed the *Preliminary Determination*. *See Antidumping Duty Order*, 58 Fed. Reg. at 33,250 ("After it withdrew from this investigation, [TYH] inquired whether A774 type stainless steel pipe fittings were included within the scope of the investigation"). Commerce did not issue a preliminary affirmative scope ruling and thus did not have the benefit of the commentary that might have followed. It did not issue a final affirmative scope ruling that provided a thorough explanation for its decision. Instead, A774 fittings were included within the scope of the *Order* on the basis of a two-paragraph team recommendation in the *Concurrence Memorandum*, which was not included or referenced in the *Order*. Accordingly, the rationale for following the A774 ruling as a "prior, similar scope determination" fails.

C. Unpersuasive Reasoning

The precedential value of the A774 ruling is undermined not only by its procedural flaws and superficial level of inquiry, but also by the limitations of its substantive claims. While the ruling's brief discussion admits that "[t]he scope does state that the edges of finished fittings are beveled," it counters with nothing more than unpersuasive assertions: (1) that the statement pertaining to beveled edges "is not a requirement;" (2) that the statement is not made

"with respect to unfinished fittings;" and (3) that the scope language "only specifically excludes threaded, bolted and grooved fittings, and none of these criteria apply to A774 fittings." *Concurrence Memorandum*, at issue 3, Pl.'s App., Doc. 3, Ex. 11 at 4. These cursory statements provide no rational basis for nullifying the plain language of the *Order* as it pertains to Top Line's tube fittings.

The first assertion—that beveling is not a requirement—is made without providing any basis in statute or regulation for distinguishing between "requirements" and other allegedly superfluous language. In its brief to the court, the Government promotes this distinction as if it needs no explanation: "previous scope rulings have consistently held that beveling is not an essential physical characteristic for a product to fall within the scope of this order."[13] Def.'s Br. at 35. What is essential, according to the Government, is that the components of the fittings are butt-welded. Def.'s Br. at 35 (describing butt-welding as the "most important aspect" of the *Order*). The implication is that other specifications in the *Order* may be ignored when they impede the *Order's* application to a given butt-welded product. *See id.* If Commerce is correct on this point, the beveling characteristic may be ignored as surplusage. Recourse to the § 351.225(k)(2) *Diversified Products* criteria might then be appropriate. There is, however, little, if any, support for the proposition that some portions of the physical description of the subject merchandise are essential while others are superfluous.

The Federal Circuit rejected a previous attempt by Commerce to interpret the *Antidumping Duty Order* as "covering any stainless steel butt-weld pipe fittings in diameter," because such a broad construction would render some of the scope language as "mere surplus-

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[13] Which prior scope rulings these are is not clear, as the Government provides no citations after making this claim and refers only to the A774 ruling in other sections of its brief. Top Line, in contrast, cites two previous scope determinations—interpreting a different order on butt-weld fittings—in which Commerce found beveling to be critical in placing the products outside the scope of the order. *See Stainless Steel Butt-Weld Pipe and Tube Fittings from Japan*, 60 Fed. Reg. 54,213 (Dep't Commerce Oct. 20, 1995) (Notice of Scope Rulings) ("A characteristic of all stainless steel butt-weld pipe fittings is that the edges of finished fittings are beveled so that when placed against the end of a pipe (the ends of which have also been beveled) a shallow channel is created to accommodate the 'bead' of the weld which joins the fittings to the pipe"); *Stainless Steel Butt-Weld Pipe and Tube Fittings from Japan*, 61 Fed. Reg. 40,194 (Dep't Commerce Aug. 1, 1996) (Notice of Scope Rulings) ("[W]e conclude that [the merchandise] whose ends are square-cut, not beveled, and thus, not designed to be butt-welded, are not the same merchandise as that covered by the scope order"). These two scope determinations turned on the issue of beveling alone.

Commerce contends that, because its determinations must be based upon the record established in the case before it, the scope established in one investigation should have no bearing upon the determination of the scope in another investigation. Def.'s Br. at 24. The determinations themselves, however, are public records and may be considered with respect to Commerce's past practices. Commerce's past practices in *Stainless Steel Butt-Weld Pipe and Tube Fittings from Japan* are particularly relevant because the petition in that case used language identical to that of the instant *Petition* to characterize the subject merchandise as having beveled edges.

age." *Eckstrom*, 254 F.3d at 1073. Even though the *Eckstrom* plaintiff's pipe fittings were intended for butt-weld connections, this was an insufficient basis for inclusion within the order. *Id.* Commerce is not at liberty to ignore the plain terms of an order on the theory that a broad interpretation of the order will best promote the intent of the petitioners. To allow for unsubstantiated distinctions between a scope's "requirements" and other, supposedly non-essential language is to invite arbitrariness and uncertainty into the process by which Commerce administers antidumping duty orders.

Commerce's approach also constitutes an improper heightening of the standard faced by a plaintiff seeking to exclude its product. Commerce cannot abandon an order's scope standard in favor of "a different, more exacting one" that a plaintiff must meet in order to have its product excluded from the scope. *See Ericsson GE Mobile Communications v. United States*, 60 F.3d 778, 783 (Fed. Cir. 1995) (rejecting Commerce's imposition of a "rigid requirement[ ] of proof of commercial availability" where the order was much less specific in terms of exclusionary end uses). A different, more exacting exclusionary standard is created where Commerce uses a selective reading to nullify portions of an order's scope language which would otherwise exclude a plaintiff's product. Commerce imposed such a standard on Top Line when it adopted the reasoning of the A774 ruling. In so doing, Commerce "strayed beyond the limits of interpretation and into the realm of amendment." *See id.* at 782.

In the second of its unpersuasive assertions, the *Concurrence Memorandum* observes that the beveling language does not pertain to unfinished fittings. *Concurrence Memorandum*, at issue 3, Pl.'s App., Doc. 3, Ex. 11 at 4. The relevance of this observation to A774 fittings is unclear, as the *Concurrence Memorandum* gives no indication that they are imported in an unfinished state. *See id.* In any case, the observation is clearly irrelevant with regard to the products at issue here. Top Line's fittings do not have beveled edges, regardless of whether they are finished or unfinished. There is no record evidence to suggest that unfinished versions of Top Line's fittings would be beveled after entry into the United States.

As for the *Order's* failure to exclude non-beveled fittings explicitly, *Duferco* extinguished the theory that a product could be covered by an order merely because the order does not explicitly exclude it. 296 F.3d at 1096. Here, the beveling sentence immediately precedes the explicit exclusion sentence, and there is no indication that one sentence helps to define the scope while the other does not. Accordingly, Commerce proved little, if anything, by observing that "our scope language only specifically excludes threaded, bolted and grooved fittings, and none of these criteria apply to A774 fittings." *Concurrence Memorandum*, at 4, Pl.'s App., Doc. 3, Ex. 11 at 4.

CONCLUSION

Because Commerce cannot interpret an antidumping order in a manner contrary to the clear terms that were a consistent part of the investigation, Top Line's fittings are outside the scope of the *Antidumping Duty Order*. No recourse to the § 351.225(k)(2) *Diversified Products* criteria is warranted. Commerce's ruling to the contrary was therefore not in accordance with the law. Accordingly, the motion for judgment on the agency record is granted, judgment shall be entered for Top Line, and Commerce must exclude Top Line's stainless steel butt-weld tube fittings from the scope of the *Antidumping Duty Order*.

SLIP OP. 04–60

BEFORE: RICHARD K. EATON, JUDGE

MICHAEL J. KENNY, PLAINTIFF, v. JOHN W. SNOW, SECRETARY OF THE TREASURY, U.S. DEPARTMENT OF THE TREASURY UNITED STATES OF AMERICA, DEFENDANT.

COURT NO. 03–00011

[Plaintiff's motion for judgment upon an agency record denied; Defendant's motion for judgment upon an agency record granted.]

Dated: June 7, 2004

Michael J. Kenny, Pro Se, for Plaintiff.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *Barbara S. Williams*, Attorney In Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice (*Harry A. Valetk*), for Defendant United States.

MEMORANDUM OPINION

EATON, *Judge*: Before the court is plaintiff Michael J. Kenny's ("Plaintiff") motion for judgment on the pleadings.[1] By his motion, Plaintiff challenges the United States Secretary of the Treasury's ("Secretary") affirmance of the United States Customs Service's

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[1] Citing both USCIT Rules 12(c) and 56.1, Plaintiff styles his motion as one for "judgment on the pleadings." *See* Pl.'s Br. Supp. Mot. J. Pleadings ("Pl.'s Mem.") at 3. However, as this action was brought pursuant to 19 U.S.C. § 1641(e)(1), and since review of the issues raised herein is based upon an agency record, the court will treat Plaintiff's motion as one made solely pursuant to Rule 56.1.

("Customs")[2] decision to deny Plaintiff credit[3] for one question on the October 2001 customs broker's license examination.[4] Defendant United States ("Defendant") opposes Plaintiff's motion and cross-moves for judgment upon an agency record, pursuant to USCIT Rule 56.1(a). The court has exclusive jurisdiction to review the denial of a customs broker's license under 28 U.S.C. § 1581(g)(1) (2000) and 19 U.S.C. § 1641(e)(1) (2000).[5] For the reasons discussed below, the court denies Plaintiff's motion and grants Defendant's cross-motion.

BACKGROUND

In October 2001, Plaintiff sat for the customs broker license examination in New York City. On November 2, 2001, Customs informed Plaintiff by letter that he had received a score of 73.75%, 1.25 percentage points below the passing score of 75%. *See* Letter from Customs to Michael J. Kenny of 11/2/01; 19 C.F.R. § 111.11(a)(4) (2001). Plaintiff timely appealed his score to Customs, seeking full credit for the answers he provided for Questions 19 and 32. *See* Letters from Michael J. Kenny to Customs of 11/12/01, Admin. R. Docs. XI (Question 19) & XII (Question 32); 19 C.F.R. § 111.13(f). Customs denied Plaintiff's appeal with respect to both questions. *See* Letter from Customs to Michael J. Kenny of 2/8/02.

On February 20, 2002, Plaintiff appealed Customs's decision to the Secretary, but only as to Question 32. *See* Letter from Michael J. Kenny to Deputy Director, Office of Trade and Tariff Affairs of 2/20/02; 19 C.F.R. § 111.17(b) ("Upon the decision of the Assistant Commissioner affirming the denial of an application for a license, the applicant may file with the [Secretary], in writing, a request for any additional review that the Secretary deems appropriate."). On De-

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[2] Effective March 1, 2003, Customs was renamed the Bureau of Customs and Border Protection of the United States Department of Homeland Security. *See* Reorganization Plan Modification for the Dep't of Homeland Security, H.R. Doc. 108–32, at 4 (2003).

[3] While in his complaint, Plaintiff "respectfully requests he be given credit for Question No. 32," Compl. ¶ 14, Plaintiff actually seeks review of the Secretary's decision to deny him a customs broker's license. *See* 19 U.S.C. § 1641(b)(1) ("No person may conduct customs business . . . unless that person holds a valid customs broker's license issued by the Secretary. . . .").

[4] An applicant for a customs broker's license is required to pass a written examination, which is "designed to determine the individual's knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters necessary to render valuable service to importers and exporters." *See* 19 C.F.R. § 111.13(a) (2001).

[5] Title 19 U.S.C. § 1641(e)(1) states:

> A customs broker, applicant, or other person directly affected may appeal any decision of the Secretary denying or revoking a license . . . by filing in the Court of International Trade, within 60 days after the issuance of the decision or order, a written petition requesting that the decision or order be modified or set aside in whole or in part.

Id.

cember 11, 2002, the Secretary affirmed Customs's decision to deny Plaintiff's appeal. *See* Letter from Deputy Assistant Sec'y Skud to Michael J. Kenny of 12/11/02.[6] Thereafter, on January 10, 2003, Plaintiff timely commenced this action pursuant to 19 U.S.C. § 1641(e)(1) and 19 C.F.R. § 111.17(c).[7]

Plaintiff seeks review of the Secretary's decision to uphold the denial of his request for credit with respect to Question 32, and seeks a reversal of the Secretary's decision, thus giving him credit for one additional answer and a passing grade on the Exam. *See* Compl. ¶14. Defendant contends that the Secretary's denial of Plaintiff's application for a customs broker's license, based on his test score, was "reasonable" and "supported by substantial evidence," and thus should be sustained. *See* Def.'s Mem. Supp. Mot. J. Admin. R. and Opp'n Pl.'s Mot. J. Pleadings ("Def.'s Mem.") at 8.

STANDARD OF REVIEW

Title 19 U.S.C. § 1641(e)(3) states that, with respect to an appeal to this Court of the Secretary's decision to deny a broker's license, "[t]he findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive." *Id.* Substantial evidence is "more than a mere scintilla." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). It "is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co.*, 305 U.S. at 229). "In applying this [substantial evidence] standard, the court affirms [the agency's] factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions." *Olympia Indus., Inc. v. United States*, 22 CIT 387, 389, 7 F. Supp. 2d 997, 1000 (1998); *see also Slater Steels Corp. v. United States*, 27 CIT ___, ___, 297 F. Supp. 2d 1351, 1356 (2003) (where "Commerce's determination . . . was reasonable [it was] thus supported by substantial evidence and in accordance with law.").

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[6] Deputy Assistant Secretary Timothy E. Skud reviewed Plaintiff's appeal under the authority delegated to him by the Secretary. *See* Aff. of Timothy E. Skud, Deputy Assistant Secretary ¶D; *O'Quinn v. United States*, 24 CIT 324, 324 n.1, 100 F. Supp. 2d 1136, 1137 n.1 (2000) (internal citations omitted).

[7] Title 19 C.F.R. § 111.17(c) states:

> Upon a decision of the Secretary of the Treasury affirming the denial of an application for a license, the applicant may appeal the decision to the Court of International Trade, provided that the appeal action is commenced within 60 calendar days after the date of entry of the Secretary's decision.

Id.

DISCUSSION

Question 32 required the examinee to classify a beverage under the correct subheading of the Harmonized Tariff Schedule of the United States (2001) ("HTSUS"). The question asked:

> Water Street Fishhouses is importing a beer from Mexico to sell at their eating establishments in Texas. The beer is made from malt with an alcoholic strength by volume of 0.4 percent. It is shipped in 1 liter glass bottles. What is the correct classification of the beer?

Oct. 2001 Exam., Question 32. The choices available to answer this question were:

> A) HTSUS 2202.90.9010, which provided for "Waters . . . and other nonalcoholic beverages . . . Other, Other, Nonalcoholic beer,"
>
> B) HTSUS 2203.00.0060, which provided for "Beer made from malt [i]n containers each holding not over 4 liters: Other,"
>
> C) HTSUS 2203.00.0030, which provided for "Beer made from malt [i]n containers each holding not over 4 liters: [i]n glass containters,"
>
> D) HTSUS 2203.00.0090, which provided for "Beer made from malt [i]n containers each holding over 4 liters,"
>
> E) HTSUS 2202.90.9090, which provided for "Waters . . . and other nonalcoholic beverages . . . Other, Other, Other."

See id.; HTSUS subheadings 2202, 2203.

Plaintiff chose (C) as the correct answer; however, the official answer was (A). In the explanation sheet issued to Plaintiff, Customs explained its reasons for finding (A) to be the correct answer:

> Chapter 22 Note 3 states: for the purposes of heading 2202 the term "nonalcoholic beverages" means beverages of an alcoholic strength by volume not exceeding 0.5 percent vol. Alcoholic beverages are classified in headings 2203 to 2206 or heading 2208 as appropriate.
>
> Chapter 22 Note 2 states: for the purposes of this chapter and of chapters 20 and 21, the "alcoholic strength by volume" shall be determined at a temperature of 20 degrees [Celsius]. The question does not contain a statement that the alcoholic strength by volume was determined at a temperature other than 20 degrees [Celsius].
>
> Therefore, the beer described in question #32 does not meet the terms of subheadings 2203.00.0030, 2203.0060 [sic], or 2203.00.0090 (answers C, B, and D, respectively). Answer E is

> incorrect because nonalcoholic beer is provided for under subheading 2202.90.9010.

Explanatory Comments to Question 32 (emphasis in original). Thus, Plaintiff was denied credit for Question 32.

Plaintiff contends that answer (C) is the best answer to Question 32 because the question did not state the temperature at which the beverage's alcoholic strength by volume was calculated. *See* Pl.'s Mem. 4–5. In Plaintiff's view, "[t]he absence of any indication at what temperature the beverage was measured can be the difference between an alcoholic and a non-alcoholic beverage." *Id.* at 5. Plaintiff further states that

> Question No. 32 indicated the alcohol strength of the malt beer was 0.4%, ostensibly making it non-alcoholic, but without knowing at what temperature it was measured that 0.4% is meaningless[.] [I]t may have been measured at 30 degrees Celsius thereby reducing its strength in order to qualify as a non-alcoholic import.

Id. at 6 (citation omitted). Plaintiff claims that the specificity of choice (C), which deals with "Beer made from malt [i]n containers each holding not over 4 liters: [i]n glass containers," makes it the best of the available choices. *Id.* at 7.

Defendant argues that "the administrative record reasonably supports Customs' decision to deny [Plaintiff's] application based on his failure to achieve a passing score of 75 on his broker's examination." Def.'s Mem. at 5. As to Plaintiff's argument that Question 32 lacked information necessary to answer the question, i.e., the temperature of the beverage being classified, Defendant reiterates the Secretary's view that Question 32 "stipulates the alcohol strength by volume, making it unnecessary to provide additional information about the temperature at the time of measurement." *Id.* at 7; *see also* Mem. from Anne Shere Wallwork to Deputy Assistant Sec'y Skud of 12/11/02 at 2 ("Note 3 defines nonalcoholic beverages as having an alcoholic strength by volume of not greater than 0.5%, so that the beer specified in the question qualifies as nonalcoholic beer.").

This Court has considered similar cases brought by customs broker's license examinees seeking review of specific exam questions. In *DiIorio v. United States*, 14 CIT 746 (1990), Mr. DiIorio sought review of five questions from the October 1989 exam after failing to achieve a passing grade of 75%. With respect to Question 38, he claimed that selecting the official answer required an examinee to rely on assumptions. The question asked what course of action a Customs District Director would take after a customs broker's client had written to dispute certain matters with respect to merchandise detained for possible copyright violations. Mr. DiIorio contended that choosing the answer that Customs insisted was correct required the examinees to assume three things: "that whatever his client 'wrote'

to the director was actually received; that such letter was received within thirty days after the denial; and that such letter was an acceptable denial." *DiIorio*, 14 CIT at 748. Mr. DiIorio argued that "requiring the examinee to leap through these assumptions in arriving at the correct answer placed an unreasonable burden on [the] test-taker." *Id.* The court, however, upheld the Secretary's denial of the appeal, finding that the Secretary's decision to deny Mr. DiIorio credit for his answers to the exam questions was a reasonable decision. *Id.* at 752. The court stated that Question 38, "[w]hile not perfect" was adequate, despite its "ambiguities." *Id.* at 748. The court specified that judicial review of agency decisionmaking as to "the formulation and grading of standardized examination questions should be limited in scope." *Id.* at 747 (noting the court "[would] not substitute its own judgment on the merits of the Customs examination, but [would] examine decisions made in connection therewith on a reasonableness standard.").

This case presents facts similar to the those in *DiIorio*. There, Mr. DiIorio argued that it was unreasonable for examinees to answer "ambiguous" questions by relying on assumptions. In the present case, Plaintiff similarly alleges that Question 32 was ambiguous. *See, e.g.*, Letter from Michael J. Kenny to Deputy Assistant Sec'y Skud of 2/20/02 ("The absence of any indication at what temperature the imported malt beer's alcoholic strength by volume was measured can easily be interpreted [in multiple ways]. . . ."). Plaintiff claims that credit should be granted for his answer as the question did not specify the temperature at which the alcoholic strength by volume was calculated, and thus to reach the official answer he would have to assume that the alcoholic strength of the beer was measured at twenty degrees Celsius. *See* Pl.'s Mem. at 5.

In another case the court found the Secretary's denial of an examinee's appeal to be unreasonable. In *O'Quinn v. United States*, 24 CIT 324, 100 F. Supp. 2d 1136 (2000), Plaintiff challenged one question, alleging that it contained insufficient information to answer correctly.[8] The court found that the question required examinees to

[8] The question asked:

The terms of sale stated on the invoice are Freight on Board (FOB). Which of the following deductions are allowed when determining the entered value?

A) The freight costs are deductible.
B) The insurance costs are deductible.
C) The freight and insurance costs are both deductible.
D) The inland freight costs are deductible.
E) No deductions are allowed.

O'Quinn, 24 CIT at 326, 100 F. Supp. 2d at 1138. The official answer to the question was (E). Mr. O'Quinn selected (C) as his answer. *Id.*

be familiar with the term "FOB."[9] Moreover, Plaintiff contended, and the court agreed, that since "FOB can refer to both port of embarkation and port of delivery," the question could not be answered as it did not specify which port was involved. *Id.* at 327, 100 F. Supp. 2d at 1139. The court found that all consulted "lexicographic authorities require a named point to follow the 'FOB' term; otherwise, the term in and of itself is ambiguous."[10] *Id.* at 328, 100 F. Supp. 2d at 1140. The court held that "[g]iven the question's incorrect use of the delivery term 'FOB,' it was unreasonable for the Assistant Secretary to affirm Customs' denial of Plaintiff's appeal of this question." *Id.* The court remanded the case to the Secretary, instructing that "Plaintiff's answer . . . must either be deemed correct or the question must be voided." *Id.* at 332, 100 F. Supp. 2d at 1143.

Unlike *O'Quinn*, Plaintiff's disputed exam question was not drafted ambiguously, nor did it require the examinee to rely on assumptions. Plaintiff insists that he chose answer (C) because the stated alcoholic strength of the beverage as 0.4% was "meaningless" unless it was known at what temperature the measurement was made; thus, "answer C was chosen . . . as the best possible answer considering all facts in the question and Chapter Notes." Pl.'s Mem. at 4. However, all the information that Plaintiff needed to answer Question 32 was available. First, the alcoholic strength of the beverage was supplied as part of the question. Second, Chapter 22 Note 3 states that " *'nonalcoholic beverages'* means beverages of an alcoholic strength by volume not exceeding 0.5 percent vol." HTSUS Chapter 22, Note 3 (emphasis in original). Thus, Plaintiff chose to ignore the stated facts of the question and now labors to find a justification for doing so. Indeed, Plaintiff's choice of (C) is all the more remarkable because, rather than relying on the given fact that the "beer . . . [had] an alcoholic strength by volume of 0.4 percent," he chose to invent a fact by assuming that the beer had an alcoholic strength by volume in excess of 0.5%. Therefore, the court agrees with the Secretary that since "the question [itself] stipulate[d] the alcohol strength by volume . . . [it was] unnecessary to provide additional information about the temperature at time of measurement." Mem. from Anne Shere Wallwork to Deputy Assistant Sec'y Skud of 12/11/02 at 2.

CONCLUSION

For the foregoing reasons, the findings of the Secretary, and the subsequent decision not to grant a customs broker's license to Plain-

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[9] The Secretary conceded that FOB was not an industry term. *See O'Quinn*, 24 CIT at 327, 100 F. Supp. 2d at 1139.

[10] For instance, Black's Law Dictionary defined FOB as "Free on board some location (for example, FOB shipping point; FOB destination)." BLACK'S LAW DICTIONARY 642 (6th ed. 1990).

tiff, is "supported by substantial evidence." 19 U.S.C. § 1641(e)(3). Accordingly, the court denies Plaintiff's motion for judgment upon an agency record and grants Defendant's cross-motion. Judgment shall be entered accordingly.

Slip Op. 04–61

BEFORE: GREGORY W. CARMAN

XL SPECIALTY INSURANCE CO. (Surety for Cosmos Electronics Co.), Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Court No. 01–00900

[Defendant's Motion to Dismiss for lack of subject matter jurisdiction is granted. Plaintiff's Motion for Leave to Amend[ ] or Supplement Complaint is denied.]

Dated: June 8, 2004

Jeffrey S. Kranig, Schaumburg, Illinois, for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice; *James A. Curley*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Michael W. Heydrich*, Attorney, Office of Assistant Chief Counsel, United States Bureau of Customs and Border Protection, of Counsel, for Defendant.

OPINION

CARMAN, Judge: Pursuant to USCIT Rule 12(b)(1), Defendant moves to dismiss this action for lack of subject matter jurisdiction. Plaintiff, XL Specialty Insurance Co. (Surety for Cosmos Electronics Co.) ("XL Speciality"), alleges jurisdiction under 28 U.S.C. § 1581(a) (2000). Defendant argues that XL Specialty failed to file a proper protest. Plaintiff opposes Defendant's motion and moves, pursuant to USCIT Rule 15(a), for leave to amend its complaint. This Court has jurisdiction to resolve this matter under 28 U.S.C. § 1581(a). As discussed below, this Court grants Defendant's Motion to Dismiss because Plaintiff's protest is not sufficient to satisfy the regulatory and statutory requirements for validity. Plaintiff's request for leave to amend its complaint is denied.

BACKGROUND

The subject entries of color television receivers manufactured in South Korea by Cosmos Electronics Co. Ltd. were entered in April

1987 and May 1987. (Compl. ¶¶5–6[1]; Def.'s Br. in Reply to Pl.'s Opp'n to Def.'s Mot. to Dismiss ("Def.'s Reply") at 3.) At the time of entry, the subject merchandise was subject to an administrative antidumping duty review for the period April 1, 1987, through March 31, 1998. (Compl. ¶8; Def.'s Reply at 3.) Under that administrative review, the entries were subject to certain importer-specific antidumping duty rates. (Compl. ¶8.) On April 21, 2000, the United States Customs Service, now organized as the Bureau of Customs and Border Protection ("Customs"), liquidated the subject entries and assessed a supplemental antidumping duty rate of 4.51% *ad valorem*. (*Id.* ¶13.) On July 12, 2000, after the importer, Cosmos Electronics, refused to pay the supplemental duties, Customs mailed a demand for payment to XL Specialty as surety for Cosmos Electronics. (*Id.* ¶14; Def.'s Mot. to Dismiss ("Def.'s Mot.") at 2.)

On October 6, 2000, Plaintiff filed a timely[2] protest challenging Customs' demand for payment of the supplemental duties. (Protest No. 3001–00–100339 at 1.) XL Specialty attached three additional pages to its protest form. (*Id.* at 2–4.) In the additional pages, XL Specialty presented several "alternative arguments" against Customs' liquidation of the subject entries. (*Id.* at 2.) The relevant portion of the protest is below. The two passages central to the parties' arguments are underlined.

> **II. SURETY'S PROTEST:**
>
> | *Entry Numbers:* | *Entry Date* | *Liquidation / Bill Date* | *Port* |
> |---|---|---|---|
> | *11006442476* | *05/17/87* | *04/21/00* | *3001* |
> | *11006441338* | *04/30/87* | *04/21/00* | *3001* |
>
> **A. ALTERNATIVE ARGUMENTS — INCORRECT DECISIONS MADE BY THE IMPORT SPECIALIST DURING LIQUIDATION:**
>
> The surety files this protest of the liquidation decisions and supplemental duty bills that relate to the captioned entries upon the belief that there errors have made in the such decisions and bills [sic].
>
> The surety hereby files this protest against your decision to: reclassify and/or reappraise the subject entries: deny drawback; assess antidumping/countervailing duties or any calculation of double antidumping duties based upon presumption of reim-

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[1] Plaintiff's complaint is mis-numbered. For the purposes of citation, this Court refers to paragraphs of the complaint as numbered from the first paragraph.

[2] "A protest by a surety which has an unsatisfied legal claim under its bond may be filed within 90 days from the date of mailing of notice of demand for payment against its bond." 19 U.S.C. § 1514(c)(3). The notice of demand for payment was mailed on July 12, 2000; thus, XL Specialty's protest, filed 86 days later on October 6, 2000, was timely under the statute.

bursement, marking duties, or any other special duties, charges or exaction, including but not limited to interest.

The surety additionally claims that the importer capped and extinguished of its liability [sic] for additional antidumping duties as allowed under 19 C.F.R. 351.212(d) and 19 U.S.C. 1673f(a)(1). To the best of the surety's knowledge, the importer may have paid the cash deposit at the applicable preliminary countervailing duty rate in effect between the date of the preliminary antidumping order and the final antidumping order.

Surety also protests any clerical error or mistake of fact made that influenced the increase in the amounts of duty found due when the entries were liquidated.

As this is a protest, surety claims: the merchandise is properly appraised at the invoice unit values and that the values that were used as the basis for the supplemental duties were excessively high, the classification and the duty rate submitted by the importer at time of entry are correct; the entry is not subject to antidumping/ countervailing duties, that even if the entries are subject to the antidumping or countervailing duties, the rate used at liquidation did not apply to entries in question [sic] and that there was no reimbursement of antidumping duties paid prior to or received by the importer of record, or any other special duties, charges or exaction, including but not limited to interest.

Additionally, on information and belief, the surety claims that entries were liquidated after the 6 month or 90 day statutory deadline imposed by 19 U.S.C. 1504(d), that the entries were not within the scope of the antidumping/countervailing duty case that Customs relied upon to determine that supplemental duties are due, and that other errors were made in the determinations that supplemental duties are due for the captioned entries.

Surety is presently gathering the information and evidence necessary to establish our claims. Upon receipt of the documents and information, we will supplement the claims made in this protest with additional information as appropriate.

(*Id.* at 2–3 (emphasis added).)

On February 8, 2001, as a "supplement" to its protest, Plaintiff filed a letter which stated that the subject entries, imported by Cosmos Electronics, were incorrectly assessed the supplemental antidumping duty rate that applied to *Cosmos Communications*, an unaffiliated Florida corporation. (Letter from Jeffrey S. Kranig, Counsel to XL Specialty Insurance Company to Customs of 02/08/01 ("February Letter") at 1.)

Customs denied Plaintiff's protest on April 19, 2001. (Protest 3001–00–100339 at 1.) As explanation for the denial, a Customs officer wrote: "Denied: Entry Liquidated timely & correctly." (*Id.*)

On October 15, 2001, Plaintiff filed a summons in this Court challenging Customs' denial of its protest based on "the Customs Officer's mistake regarding applicable antidumping duty rate to be assessed to Cosmos Electronics Co. entries," and "the Customs Officer's mistake regarding the deemed liquidation status of the entries under [19 U.S.C. §] 1504(d).[3]" (Summons at 2.) On April 29, 2003, Plaintiff filed its complaint alleging that the subject entries were incorrectly assessed the supplemental antidumping duty rate that applied to Cosmos Communications, an unaffiliated Florida corporation. (Compl. ¶¶7, 13.) Plaintiff's complaint did not allege that the subject entries were deemed liquidated under § 1504(d). After two extensions of time in which to answer were granted, Defendant filed its Motion to Dismiss on October 30, 2003. (*See* Def.'s Mot. at 8.)

As detailed in Plaintiff's contentions below, the bulk of Plaintiff's opposition to Defendant's Motion to Dismiss rests on Plaintiff's assertion that its protest was valid because it contained a sufficient deemed liquidation claim. (*See* Pl.'s Resp. to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") at 1–6.) After reviewing the parties' submissions, this Court asked for further briefing on the issue of whether Plaintiff's contention that its protest was sufficient based on its deemed liquidation claim was effected by the fact that Plaintiff did not allege deemed liquidation in its complaint. (*See* Letter to Counsel from the chambers of Judge Carman of 03/30/04.) In response to that letter, Plaintiff filed a Motion for Leave to Amend[ ] or Supplement Complaint ("Pl.'s Mot. to Amend") asking to add a deemed liquidation claim. (Pl.'s Mot. to Amend at 1.) Defendant opposes Plaintiff's request to amend its complaint.

DISCUSSION

As the party seeking to invoke this Court's jurisdiction, XL Specialty bears the burden of establishing jurisdiction. *See Old Republic Ins. Co. v. United States*, 741 F. Supp. 1570, 1573 (Ct. Int'l Trade 1990) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). XL Specialty alleges jurisdiction under 28 U.S.C. § 1581(a). (Compl. ¶1.) Because Defendant's Motion to Dismiss chal-

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[3] Deemed liquidation is provided for in 19 U.S.C. § 1504(d):

> when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry, unless liquidation is extended . . . within 6 months after receiving notice of the removal from the Department of Commerce. . . . Any entry . . . not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

19 U.S.C. § 1504(d).

lenges the factual basis of XL Specialty's allegations of jurisdiction, the allegations in the complaint are not controlling and only the uncontroverted facts will be accepted as true. *See SSK Indus., Inc. v. United States*, 101 F. Supp. 2d 825, 829 (Ct. Int'l Trade 2000) (citing *Power-One, Inc. v. United States*, 83 F. Supp. 2d 1300, 1303 (Ct. Int'l Trade 1999) and *Cedars-Sinai Med. Cntr. v. Walters*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993)). All other facts underlying jurisdiction "are subject to fact-finding by this Court." *Id.*

Under 28 U.S.C. § 1581(a), this Court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a). "Therefore a prerequisite to jurisdiction by the Court is the denial of a valid protest." *Volkswagen of Am., Inc. v. United States*, 277 F. Supp. 2d 1364, 1367 (Ct. Int'l Trade 2003) (citing *Washington Int'l Ins. Co. v. United States*, 16 Ct. Int'l Trade 599, 601 (1992)); *see also Koike Aronson, Inc. v. United Sates*, 165 F.3d 906, 908 (Fed. Cir. 1999) ("By its terms, section 1581(a) limits the jurisdiction of the Court of International Trade to appeals from denials of valid protests.").

In order for a protest to be valid, it must satisfy the statutory and regulatory requirements set forth in 19 U.S.C. § 1514(c) and 19 C.F.R. § 174.13(a). In addition to other formal requirements, § 1514(c)(1) states that "[a] protest must set forth distinctly and specifically . . . each decision . . . as to which protest is made; . . . the nature of each objection and the reasons therefor; and . . . any other matter required by the Secretary by regulation." 19 U.S.C. § 1514(c)(1). Regulation § 174.13 states that "[a] protest shall contain the following information . . . [t]he nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal." 19 C.F.R. § 174.13(a)(6).

PARTIES' CONTENTIONS

I. Defendant's Motion to Dismiss.

A. Defendant's Contentions.

Defendant contends that this Court lacks subject matter jurisdiction over this action because Plaintiff's protest does not meet the statutory and regulatory requirements for validity. (Def.'s Mot. at 5.) Specifically, Defendant contends that Plaintiff's protest failed to set forth distinctly and specifically, "the nature of each objection and the reasons therefor" as required by statute. (*Id.* (quoting 19 U.S.C. § 1514(c)(1)(C)).) Further, Defendant asserts that Plaintiff's protest failed to specify the "justification for each objection set forth distinctly and specifically," as required by Customs' regulations. (*Id.* (citing 19 C.F.R. § 174.13(a)(6)).) Defendant contends that XL Spe-

cialty's protest "failed to state any reason for the objections that would have allowed Customs to decide whether it had incorrectly liquidated the entries." (*Id.*)

Defendant characterizes Plaintiff's protest as a "blanket protest" that merely listed every possible objection to Customs' liquidation and did not include any reasons to support those objections. (Def.'s Mot. at 6.) Defendant contends that "[s]uch a blanket protest undermines the administrative remedy provided by Congress because it does not give Customs an opportunity to correct its mistakes." (*Id.* (citing *Davies v. Arthur*, 96 U.S. 148, 151 (1877)).) To highlight the protests' "all encompassing nature," Defendant contends that "[m]ost of the objections in the protest have nothing to do with Customs' liquidation of the entries in issue." (*Id.* at 6 n.2.) Defendant notes that Plaintiff protested Customs' decision to deny drawback and assess marking duties, yet "the importer never applied for drawback . . . and Customs did not assess marking duties on the entries." (*Id.* (citing Protest No. 3001–00–100339 at 2–3).) Defendant argues that the administrative "policy behind the protest procedure . . . will be undermined" if Plaintiff's protest is held to be valid in this case. (Def.'s Reply at 10.)

In its Reply Brief, Defendant addresses Plaintiff's two central contentions: 1) that its protest was valid because it contained a sufficient deemed liquidation claim; and 2) that its protest was valid because it contained a sufficient wrong assessment rate claim. (Def.'s Reply at 2–6 (referencing Pl.'s Opp'n at 3–6).) Defendant contends that these statements "are objections to Customs' decision, not reasons why Customs' decision to assess antidumping [duties] was incorrect." (*Id.* at 2.)

First, Defendant counters Plaintiff's contention that the protest was valid based on its objection to "Customs' decision . . . to assess antidumping/countervailing duties" because "the entries were liquidated after the 6 month . . . statutory deadline imposed by 19 U.S.C. 1504(d)." (*Id.* at 2 (citing Pl.'s Br. at 3 (in turn citing Protest No. 3001–00–100339 at 2–3).) Defendant asserts that the quoted protest language is "merely a statement of [Plaintiff's] claim," and "offers no reason why the entries liquidated in accordance with § 1504(d)." (*Id.* at 4.) Defendant contends that Plaintiff's deemed liquidation claim cannot be a "reason" for protesting Customs' decision to assess antidumping duties because, even if the entries were deemed liquidated, antidumping duties would still be assessed by Customs at the rate entered. (Def.'s Reply at 3.)

Additionally, Defendant contends that the deemed liquidation statement in Plaintiff's protest cannot be the basis for validity because it failed to set forth any of the required elements for deemed liquidation as "reasons" for the deemed liquidation objection. (Def.'s Reply at 4.) Defendant contends that courts have held that "in order for a deemed liquidation to occur, (1) the suspension of liquidation

that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; (3) Customs must not liquidate the entry at issue within six months of receiving such notice." (*Id.* (quoting *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002)).) Defendant contends that Plaintiff's protest failed "to state any fact that relates its claim under § 1504(d) to Customs' liquidation of the entries in issue." (*Id.* at 5.) Defendant contends that "[i]n the absence of such information, the plaintiff has not stated a reason why Customs' liquidation decision was incorrect, and does not give Customs the information necessary to correct [its decision] if warranted." (*Id.*)

Second, Defendant addresses Plaintiff's contention that its protest was valid based on a wrong assessment rate claim. (*Id.* at 5; Def.'s Reply at 6–7.) Defendant stresses that even if the statement that "the rate used at liquidation did not apply to entries in question" could be construed to state an objection, the protest is still invalid "because it does not state the reasons why the rate used by Customs did not apply to the entries in question." (Def.'s Mot. at 7 (quoting Protest No. 3001–00–100339 at 2).) Although Plaintiff argues that Customs had the opportunity to inquire further about this issue, Defendant asserts that "Customs had no better reason to investigate [the wrong assessment rate] objection than the dozen or so other objections raised in the protest." (Def.'s Reply at 7.) Defendant contends that "the failure of a protest to include the necessary reasons cannot be cured . . . by arguing that Customs could have conducted an investigation to obtain the missing information." (Def.'s Reply at 8–9.) Defendant contends that because Plaintiff failed to state a reason why "the rate used at liquidation did not apply to the entries in question," (Protest No. 3001–00–100339 at 2), the protest was invalid under the statute and regulation. (Def.'s Reply at 7–8.)

Next, Defendant addresses Plaintiff's February Letter which contained certain facts regarding the wrong assessment rate claim. (Def.'s Mot. at 5–6.) Defendant contends that Plaintiff attempted to amend its protest with the additional information contained in the February Letter. (*Id.* at 6 n.1) Defendant notes that a protest can be amended "to include objections . . . that were not the subject of the original protest," but asserts that these objections "must be made before expiration of the 90-day period in which the protest could have been filed." (*Id.* (citing 19 U.S.C. § 1514(c)(1)).) Defendant contends that the February Letter "cannot cure the defects in the protest" because the letter was not filed within 90 days of the demand for payment as required by statute. (*Id.* at 5.) Further, Defendant asserts that the February Letter cannot qualify as "new grounds in support of objections raised by a valid protest" because the protest was not valid when it was filed with Customs for the reasons given above. (*Id.* at 6 n.1 (quoting 19 U.S.C. § 1514(c)(1)).)

Defendant contends that the statement in the protest that Plaintiff "is presently gathering the information and evidence necessary to establish our claims," indicates that when the protest was filed, Plaintiff did not have a reason to support its objections and would inform Customs later of the reason. (*Id.* at 6.) Defendant asserts that Plaintiff did not afford Customs the opportunity to correct its mistakes because Plaintiff failed to submit the necessary "reasons" for its objections when it filed its protest. (*Id.*) Defendant contends that Plaintiff included "every conceivable ground for challenging [Customs'] decision with the hope or expectation that a reason eventually would be found." (Def.'s Reply at 7.)

B. Plaintiff's Contentions.

Plaintiff contends that its protest fulfilled all the statutory and regulatory requirements for validity. (Pl.'s Opp'n at 1.) Plaintiff asserts that its protest is sufficient because it objected to Customs' decision to assess antidumping duties based on two claims set forth in the protest: 1) a deemed liquidation claim; and 2) a wrong assessment rate claim. (*Id.* at 3, 6.)

First, Plaintiff draws the Court's attention to the statement in its protest that Plaintiff objected to Customs' "decision to . . . assess antidumping/countervailing duties" because "the entries were liquidated after the 6 month . . . statutory deadline imposed by 19 U.S.C. 1504(d)." (*Id.* at 3 (quoting Protest No. 3001–00–100339 at 2–3).) Plaintiff contends that this statement is a sufficient "reason" for objecting to Customs' decision. (*Id.*) Plaintiff contends that this statement's "lack of details is not a fatal flaw." (*Id.* at 4.) Plaintiff acknowledges that this statement does not provide the underlying facts, but asserts that the statement is a sufficient reason for its objection. (*Id.* ("The fact that the statement does not provide either the in depth chronology of the six month liquidation period or of the gap between the expiration of that period and the liquidation date does not make the statement something other than a reason for the plaintiff's protest objection.").) Plaintiff contends that the court has rejected the contention that "the absence of precise facts" renders a protest invalid. (*Id.* at 4–5 (citing *Volkswagen*, 277 F. Supp. 2d at 1369).)

Plaintiff asserts that the sufficiency of the deemed liquidation claim "as a protest objection and reason therefor" is further bolstered by the fact that the Customs officer "respond[ed] to the claim in the protest decision." (*Id.* at 5.) Plaintiff contends that "the import special[ist] signed the protest denial decision in part because he believed that the entry was 'liquidated timely.' " (*Id.* (citing Protest No. 3001–00–100339 at 1).) Plaintiff asserts that the deemed liquidation claim was sufficient to "allow[ ] Customs the opportunity to review the documentation in the liquidated entry files to determine whether

the liquidation was timely" because Customs' records contained the "dates of entry, the antidumping case number, the importer and exporter names, and the date of liquidation." (*Id.* at 6.) Plaintiff contends that this information made it "relatively simple" for Customs to conduct an investigation "to determine the trigger date for the liquidation period provided by 19 U.S.C. § 1504(d), the date of expiration of that six month period, and the timeliness of the liquidation with respect to the expiration of the six month period." (*Id.*)

Second, Plaintiff asserts that the "main issue in this case is the claim that Customs used the wrong assessment rate to liquidate the entries." (*Id.*) Plaintiff contends that its protest is valid because this claim was also sufficiently set forth in the protest: "even if the entries are subject to antidumping or countervailing duties, the rate used at liquidation did not apply to the entries in question." (*Id.* (quoting Protest No. 3001–00–100339 at 3).) Plaintiff contends that "the protest's reference to the inapplicability of the antidumping rate . . . was sufficient to meet the protest validity requirements provided in 19 U.S.C. § 1514(c)(1)(C)." (*Id.* at 7.) Plaintiff contends that minimal additional investigation was necessary for Customs to determine if an incorrect duty rate had been applied because "Customs merely needed to . . . compar[e] the importer's name on the entry documents to the importer names on the liquidation instructions to ascertain that the rate used at liquidation pertained to Cosmos Communications, not Cosmos Electronics." (*Id.*) Plaintiff asserts that, based on the language in the protest and the information contained in the entry file, "Customs had the opportunity to perform the investigation of a specific question." (*Id.*) Plaintiff contends that "[i]t is irrelevant to the issue of protest validity that Customs['] discretion or administrative protocols or priorities may have required more information before Customs would ever have agreed to perform the inquiry and further investigate the applicability of the rate." (*Id.*)

Plaintiff claims that Defendant clouds the issue by drawing attention to Plaintiff's statement in the protest that the surety "is presently gathering the information and evidence necessary to establish our claims." (*Id.* at 9 (quoting Protest No. 3001–00–100339 at 3).) Plaintiff contends that "the protest reasons were concretely provided independent of the notice that the surety intended to provide additional information." (*Id.*) Plaintiff asserts that this statement in the protest was "not a notice that the protest lacked reasons for the objections to the protestable [Customs] decisions." (*Id.*) Plaintiff concludes that the "deemed liquidation claim and the incorrect assessment rate claim in this protest provided Customs with defined courses of inquiry to pursue to determine whether the claims had merit." (*Id.*)

Alternatively, Plaintiff contends that "[a]t a minimum," the protest raised a sufficient objection and the "specific facts" in the February

Letter "provided new grounds in support thereof in accordance with 19 U.S.C. [§] 1514(c) and the *Pagoda* and *Fujitsu* decisions." (*Id.*) Plaintiff states that the February Letter "was a timely filed supplement to the objection already raised in the protest here just like the protest and supplement in *Pagoda*." (*Id.*) Plaintiff cites *Pagoda Trading v. United States*, 804 F.2d 665 (Fed. Cir. 1986), to argue that under § 1514(c), this Court should find that the February Letter was a timely "new ground" in support of the wrong assessment rate objection already raised in the protest. (*Id.* at 3, 9.) Plaintiff contends the because the February Letter "did not challenge a different 'decision,' but merely raised a 'new ground' in support of the objections in the original protest," the letter "did not have to be filed within the 90-day period." (*Id.* at 3 (quoting *Pagoda*, 804 F.2d at 668).) Plaintiff concludes that because its protest was sufficient to satisfy the statutory and regulatory requirements for validity, Defendant's Motion to Dismiss should be denied. (*Id.* at 9–10.)

ANALYSIS

I. Defendant's Motion to Dismiss is Granted.

This Court holds that Plaintiff's protest failed to meet the statutory and regulatory requirements for sufficiency of protest. Therefore, this Court lacks jurisdiction over this case, and Defendant's motion to dismiss is granted. "[D]enial of jurisdiction for insufficiency of protest is a severe action which should be taken only sparingly." *United States v. Parksmith Corp.*, 514 F.2d 1052, 1057 (C.C.P.A. 1975) (quoting *Eaton Mfg. Co. v. United States*, 469 F.2d 1098 (C.C.P.A. 1972)). "The court generally construes a protest in favor of finding it valid unless the protest 'gives no indication of the reasons why [Customs'] action is alleged to be erroneous.' " *Sony Elecs., Inc. v. United States*, No. 98–07–02438, 2002 Ct. Int'l Trade LEXIS 20, at *6 (Ct. Int'l Trade Feb. 26, 2002) (emphasis added) (citing *Koike Aronson*, 165 F.3d at 908) (in turn quoting *Washington Int'l Ins. Co.*, 16 Ct. Int'l Trade at 602). Although protests are to be liberally construed, *Mattel, Inc. v. United States*, 377 F. Supp. 955, 960 (Cust. Ct. 1974), that "does not . . . mean that protests are akin to notice pleadings and merely have to set forth factual allegations without providing any underlying reasoning," *Computime, Inc. v. United States*, 772 F.2d 874, 879 (Fed. Cir. 1985) (emphasis added).

Section 1514(c)(1) states that among other requirements,

> A protest must set forth distinctly and specifically —
> (A) each decision . . . as to which protest is made;
> (B) each category of merchandise affected by each decision . . . ;
> (C) the nature of each objection and the reasons therefor; and
> (D) any other matter required by the Secretary by regulation.

19 U.S.C. § 1514(c)(1). Customs' regulations require that a protest include "[t]he nature of, and justification for the objection set forth distinctly and specifically with respect to each . . . decision." 19 C.F.R. § 174.13(a)(6). In applying the statutory and regulatory requirements, courts have held that "[a] protest must be sufficiently distinct and specific to enable the Customs Service to know what is in the mind of the protestant." *Parksmith Corp.*, 514 F.2d at 1057; *see also Eaton Mfg. Co.*, 469 F.2d at 1098. The Supreme Court has ruled that:

> Protests . . . must contain a distinct and clear specification of each substantive ground of objection to the payment of the duties. Technical precision is not required; but the objections must be so distinct and specific, as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated.

Davies v. Arthur, 96 U.S. at 151; *see also, Mattel, Inc.*, 377 F. Supp. at 960 (A protest is sufficient "for purposes of [19 U.S.C. § 1514,] if it conveys enough information to apprise knowledgeable officials of the importer's intent and the relief sought.").

Here, the parties agree that Plaintiff's protest stated the decision that was being protested: Customs' decision to assess supplemental antidumping duties. (Pl.'s Opp'n at 3, 6; Def.'s Reply at 2–3.) However, the parties disagree whether the two passages in the protest highlighted by Plaintiff merely stated "the nature of the objection," as Defendant claims, (Def.'s Mot. at 5–7), or whether the two passages sufficiently stated "the nature of the objection and the reasons therefor," as Plaintiff contends, (Pl.'s Opp'n at 8). *See* 19 U.S.C. § 1514(c)(1)(emphasis added). This Court holds that Plaintiff's protest merely stated the nature of its objections to Customs decision to assess duties. Therefore, this Court holds that Plaintiff's protest was not valid because it failed to state distinctly and specifically the reasons or justifications for its objections to Customs' decision as required under the statute and regulation. *See* 19 U.S.C. § 1514(c); 19 C.F.R. § 174.13(a)(6). This Court holds that it is not possible to determine the reasons or justifications for Plaintiff's objections from the text of the protest. *See Ammex Inc. v. United States*, 288 F. Supp. 2d 1375, 1382 (Ct. Int'l Trade 2003). This Court further holds that there is no possible construction of the language of the protest that would indicate that the protest gave the Customs official reviewing the protest sufficient information such that the official could correct any mistakes in liquidation.

1. Plaintiff's Protest is Not Valid Based on its Deemed Liquidation Claim.

Plaintiff's deemed liquidation claim is not sufficient under 19 U.S.C. § 1514(c)(1) and 19 C.F.R. § 174.13(a)(6); thus, the deemed liquidation claim cannot be a basis for holding Plaintiff's protest valid. Applying the statutory requirements to Plaintiff's deemed liquidation claim, Plaintiff's protest stated the decision that was being protested: "[Customs'] decision to . . . assess antidumping/countervailing duties." (Protest No. 3001–00–100339 at 2.) The protest also stated the nature of the objection to that decision: "the entries were liquidated after the 6 month . . . statutory deadline imposed by 19 U.S.C. 1504(d)." (*Id.* at 3.) However, Plaintiff's protest does not fulfill the requirement that a protest state the "reasons" and "justifications for the objection." *See* 19 U.S.C. § 1514(c)(1)(C); 19 C.F.R. § 174.13(a)(6).

Plaintiff's protest failed to provide "any underlying reasoning" for its deemed liquidation objection. *Computime*, 772 F.2d at 878. Plaintiff's protest failed to state why the entries were deemed liquidated. Plaintiff's protest did not indicate that there was a suspension of liquidation, when and if that suspension had been removed, or if Customs had received notice of the removal. *See Fujitsu Gen. Am. Inc.*, 283 F.3d at 1376. This Court is not persuaded by Plaintiff's argument that the underlying reasoning could have been determined by Customs with minimal investigation. (*See* Pl.'s Opp'n at 6.) Under the statute, Plaintiff clearly bears the burden of setting forth the reasons and justifications for its objections to Customs' decisions. *See* 19 U.S.C. § 1514(c)(1) ("[a] protest must set forth distinctly and specifically . . . the reasons therefor." (emphasis added)); *see also Washington Int'l Ins. Co.*, 16 Ct. Int'l Trade at 604 (finding the plaintiff's protest invalid for failure to provide reasons for its objection to Customs' classification and stating that "[a]ny other ruling by this court would . . . effectively require Customs to scrutinize the entire administrative record of every entry in order to divine potential objections and supporting arguments which an importer meant to advance.").

This Court recognizes that liberal construction of the validity requirements is generally afforded to protests, but notes that courts have not hesitated to find protests invalid if the protest "gives no indication of the reasons why the collector's action is alleged to be erroneous." *Koike Aronson*, 165 F.3d at 908 (emphasis added) (quoting *Washington Int'l Ins. Co.*, 16 Ct. Int'l Trade at 602); *see also Ammex*, 288 F. Supp. 2d at 1381–82 (finding that the plaintiff's protest "neither states the 'reasons' for the objection, 19 U.S.C. § 1514(c), nor does it elaborate on the 'justification for [the] objection set forth distinctly and specifically,' 19 C.F.R. § 174.13(a)(6)").

Further, this Court is not persuaded by Plaintiff's contentions that the protest "must have been sufficiently informative," because of the

written response of the Customs official on the protest form. (*See* Pl.'s Opp'n at 5.) In rejecting similar arguments, the court has held that "[t]he test for determining the validity and scope of a protest is objective and independent of a Customs official's subjective reaction to it." *Sony Elecs., Inc.*, No. 98–07–02438, 2002 Ct. Int'l Trade LEXIS 20, at *5 (citing *Power-One Inc.*, 83 F. Supp. 2d at 1305).

2. Plaintiff's Protest is Not Valid Based on its Wrong Assessment Rate Claim.

Plaintiff's protest states that: "even if the entries are subject to antidumping duties, the rate used at liquidation did not apply to the entries in question." (Protest No. 3001–00–100339 at 3.) This Court holds that this statement is insufficient to find Plaintiff's protest valid. The protest states the objection to Customs' decision to assess duties: the rate assessed did not apply to the subject entries. However, like the deemed liquidation claim, the protest failed to state the "reasons" for its objections. It is not possible to determine from Plaintiff's protest any reason why the rate assessed did not apply to the subject entries. Plaintiff's statement fails to set forth the "justification for the objection . . . distinctly and specifically." 19 C.F.R. § 174.13(a)(6).

Arguably, the February Letter contained the reasons and justifications for Plaintiff's objection that the assessed rate did not apply to the subject entries. However, under 19 U.S.C. § 1514(c), a protest may only be amended within the 90-day time period for protesting Customs' decision. 19 U.S.C. § 1514(c)(1) ("A protest may be amended . . . to set forth objections . . . which were not the subject of the original protest . . . any time prior to the expiration of the time in which such protest could have been filed."). The February Letter is dated February 8, 2001, almost seven months after Customs mailed its demand for payment to Plaintiffs and well after the 90-day time period for filing a protest had expired. Therefore, the February Letter cannot not cure the defects in Plaintiff's invalid protest. Further, this Court holds that the February Letter does not come "within a recognized exception to the 90-day deadline prescribed by section 1514(c)(3)." *Fujitsu Gen. Am.*, 283 F.3d at 1372. Contrary to Plaintiff's contentions, this Court cannot assert jurisdiction over Plaintiff's wrong assessment rate claim as "new grounds in support of objections raised by a valid protest." 19 U.S.C. § 1514(c)(1). The "new ground" exception requires an underlying valid protest, and, as detailed above, Plaintiff's protest was not valid because the protest failed to provide the reasons for its objections.

3. Policy Reasons Support the Conclusion Reached by this Court.

This Court agrees with Defendant's characterization of Plaintiff's protest as a "blanket protest." (*See* Def.'s Mot. at 6.) The language of

the protest seems to indicate that Plaintiff did not know the reasons or justifications for its protest at the time that the protest was filed. Such a blanket protest does not further the objectives of the administrative process. The court has already rejected the "blanket" method of protest that Plaintiff employed in this case. *See Washington Int'l*, 16 Ct. Int'l Trade at 605. In *Washington International*, the court rejected the plaintiff's argument that checking a box that stated that it challenged the classification of the merchandise was sufficient for a valid protest under 19 U.S.C. § 1514(c). *Id.* at 602–03. In rejecting the plaintiff's argument, the court stated that

> as a matter of policy plaintiff's argument cannot be countenanced. Under plaintiff's interpretation, an importer could simply check every available objection listed on the protest, and then submit at its leisure a 'supplemental' letter containing the reasons for the objections anytime prior to the resolution of the protest. Such a result would surely 'thwart the scheme of orderly claim assessment envisaged by § 1514.'

Id. at 605 (emphasis added) (quoting *CR Indus. v. United States*, 10 Ct. Int'l Trade 561, 565 (1986)). In effect, that is what Plaintiff has done here. Plaintiff listed "every available objection" to decision of the Customs official and then submitted a "supplemental" letter months later. *Id.* Such a protest is invalid under the statutory and regulatory requirements and does not further the "orderly claims assessment" mandated by Congress in 19 U.S.C. § 1514. *Id.*

II. Plaintiff's Motion to Amend its Complaint is Denied.

Having determined that this Court is without jurisdiction under 28 U.S.C. § 1581(a), granting Plaintiff leave to amend its pleadings in this case would be futile because any such amendment could not cure the deficiencies in Plaintiff's protest. Therefore, Plaintiff's Motion to Amend is denied.

CONCLUSION

This Court holds that Plaintiff's protest was not valid because the protest did not contain the reasons and justifications for Plaintiff's objections to Customs' decision. Thus, this Court lacks jurisdiction to hear Plaintiff's claims under 19 U.S.C. § 1581(a). Defendant's Motion to Dismiss for lack of subject matter jurisdiction is granted. Plaintiff's Motion to Amend is denied.

Slip Op. 04–62

NORSK HYDRO CANADA INC., Plaintiff, v. UNITED STATES, Defendant and US MAGNESIUM LLC, Defendant-Intervenor.

BEFORE: POGUE, JUDGE
Court No. 03–00828

ORDER

WHEREAS, in this matter, on January 27, 2004, this Court issued a preliminary injunction against liquidation of entries of pure magnesium and alloy magnesium from Canada "during the pendency of this litigation," and

WHEREAS Plaintiff has by Motion requested that this Court clarify its preliminary injunction to specify that said injunction remains in effect "during any appeals and/or remands," and

WHEREAS 19 U.S.C. § 1516a(c)(2) provides that this Court may enjoin said liquidation "upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances . . .", and

WHEREAS the parties agree that injunctive relief should be granted under the circumstances, and

WHEREAS Defendant's sole objection to the requested relief is to the duration of said relief, as continuing through any appeals and/or remands, and

WHEREAS 19 U.S.C. § 1516a(e)(2) provides that "entries, the liquidation of which was enjoined under subsection (c)(2) of this section, shall be liquidated in accordance with the final Court decision in the action" if the action is sustained, and

WHEREAS, Plaintiff has requested that this Court take note of subsequent authority issued after the January 27, 2004 preliminary injunction in this matter, specifically *Yancheng Baolong Biochemical Prods. Co. v. U.S.*, slip op. 04–42 (CIT April 28, 2004), and *SKF USA Inc. v. U.S.*, slip op. 04–14 (CIT Feb. 18, 2004), and

WHEREAS the relief requested by the Plaintiff will serve the interest of judicial economy and efficiency by maintaining the status quo pending the conclusion of this litigation without requiring further action by the Court, and

WHEREAS Defendant has neither alleged nor shown any prejudice resulting from the requested relief, NOW THEREFORE,

Upon consideration of the Notice of Subsequent Authority and Motion to Clarify the Preliminary Injunction filed by Norsk Hydro Canada Inc. ("NHCI"), it is hereby:

ORDERED that NHCI's motion to clarify the preliminary injunction is GRANTED; and it is further

ORDERED that Defendant, the United States, together with the delegates, officers, agents, servants, and employees of the United

States Department of Commerce and the United States Bureau of Customs and Border Protection, shall be, and hereby are, ENJOINED, during the pendency of this litigation (including any appeals and/or remands) and until entry of final judgment by this Court in this litigation, from liquidating or causing or permitting liquidation of any unliquidated entries of pure magnesium and alloy magnesium from Canada that:

(1) were exported by NHCI;

(2) are covered by *Pure Magnesium and Alloy Magnesium from Canada: Final Results of Countervailing Duty Administrative Review*, 68 Fed. Reg. 53,962 (Dep't Commerce September 15, 2003) ("Final Results");

(3) were entered, or withdrawn from warehouse, for consumption, during the period January 1, 2001 through December 31, 2001; and

(4) remain unliquidated as of 5 o'clock p.m. on the fifth business day after the day upon which copies of the Order are personally served by Plaintiff upon the following individuals and received by them or by their delegates:

Ann Sebastian
Import Administration, International Trade Administration
U.S. Department of Commerce
14th Street and Pennsylvania Ave., NW
Washington, DC 20230;

Hon. Robert C. Bonner, Commissioner of Customs
Attn: Alfonso Robles, Esq. Chief Counsel
U.S. Bureau of Customs and Border Protection
1301 Constitution Ave., NW, Rm. 3305
Washington, DC 20004; and

Stephen C. Tosini, Esq.
Commercial Litigation Branch, Civil Division
United States Department of Justice
1100 L Street, NW, Suite 11064
Washington, DC 20530

and it is further

ORDERED that the entries subject to this injunction shall be liquidated in accordance with the final court decision in this action, as provided in 19 U.S.C. § 1516a(e).

Slip Op. 04–63

BEFORE: RICHARD W. GOLDBERG, SENIOR JUDGE

SLATER STEELS CORP., FORT WAYNE SPECIALITY ALLOYS DIVISION; CARPENTER TECHNOLOGY CORP., CRUCIBLE SPECIALTY METALS DIVISION, CRUCIBLE MATERIALS CORP.; ELECTRALLOY CORP.; UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC; ACCIAIERIE VALBRUNA S.P.A., Plaintiffs, v. UNITED STATES, Defendant, and TRAFILERIE BEDINI, SRL, Defendant-Intervenor.

Consolidated Court No. 02–00189

JUDGMENT ORDER

Upon consideration of the *Final Results of Redetermination Pursuant to United States Court of International Trade Remand Order* ("*Redetermination Results*") filed by the Department of Commerce ("Commerce") pursuant to the Court's decision in *Slater Steels Corp. v. United States*, Slip Op. 03–162 (Dec. 16, 2003), and upon the parties' comments regarding the *Redetermination Results*; upon all other papers filed herein, and upon due deliberation; the Court finds that Commerce adequately distinguished the five administrative determinations cited in the Court's remand instructions. Accordingly, it is hereby

ORDERED that the *Redetermination Results* are sustained in all respects; and it is further

ORDERED that judgment is entered for defendant.

SO ORDERED.

Slip Op. 04–64

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC., NTN-BOWER CORPORATION and NTN-BCA CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN U.S. CORPORATION, Defendant-Intervenor.

Court No. 00–09–00443

JUDGMENT

This Court, having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Remand Determination* pursuant to *NTN Corp. v.*

United States, 28 CIT ___, 306 F. Supp. 2d 1319 (2004), and Commerce having complied with this Court's instructions contained therein, it is hereby

ORDERED that the *Final Remand Determination* is affirmed in its entirety, and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. / DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C04/33 5/18/04 Ridgway, J.	Pomeroy Collection, Ltd.	01–01003	MX7013.39.60 4.8% MX7013.39.50 10% MX7013.99.50 20% MX7013.99.90 4.8%	MX7020.00.60 Free of duty MX9405.50.40 Free of duty	Agreed statement of facts	Laredo Replacement glass articles
C04/34 5/20/04 Aquilino, J.	Pomeroy Collection, Ltd.	03–00829	MX7013.99.90 3.3%	MX9405.50.40 Free of duty	Agreed statement of facts	Laredo "Stilton Wall Floral" articles
C04/35 5/24/04 Restani, C.J.	SSK Indus., Inc.	00–08–00389	8479.89.95/97 3.2% or 2.5% 9025.80.50 1.6%	9303.90.80 2% in 1996 Free of duty in 2000 and 2001	Agreed statement of facts	Cleveland Cybernetic parachute release systems
C04/36 5/25/04 Musgrave	Simon Mktg., Inc.	99–10–00621	7326.20.0050 4.3% 9503.90.0045 0%	7326.20.0070 3.9% 9503.90.0080 0%	Agreed statement of facts	Los Angeles Plastic toys
C04/37 6/2/04 Carman, J.	Benteler Indus., Inc.	96–05–01475	7304.59.80 6.8%	8708.90.80 At the dutiable rate in effect at the date of entry	Agreed statement of facts	Baltimore Detroit Tubular sections of BTR 150(Ni) or BTR 155

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